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TRANSCRIPT OF RECORD

Proceedings in the District Court of the United States for the Western District of Kentucky, at a regular term begun and held in Paducah on the 16th day of April, 1951.

Present: Honorable Roy M. Shelbourne, Judge, United States District Court for the Western District of Kentucky.

The Illinois Central Railroad Company, Inc., - Plaintiff,

vs. Paducah No. 557.

Brandeis Machinery & Supply Company, Inc.,
S. G. Olberding, d/b/a Vess Transfer Company,
Charles Darnell, - - - - - - - Defendants.

Be It Remembered, that heretofore, to-wit, on the 10th day of May, 1951, came the Plaintiff by its counsel and tendered its Complaint in the above styled action, which Complaint was filed in the office of the Clerk of this Court and which is in words and figures as follows:

COMPLAINT—Filed May 10, 1951.

I.

The plaintiff, the Illinois Central Railroad Company, Inc., states that it is a corporation created and existing under the laws of the State of Illinois with authority to engage in the operation of a railroad in interstate commerce and qualified to and is engaged in the operation of a railroad through various counties of the State of Kentucky

including McCracken County and it is a non-resident of the State of Kentucky.

The defendant, Brandeis Machinery & Supply Company, is a corporation created and existing under the laws of the State of Kentucky and engaged in business in McCracken County, Kentucky. The defendant, S. G. Olberding, is a resident of 321 North Kerth Street, City of Evansville, in the State of Indiana, and is engaged in a transfer and trucking business under the firm name and style of "Vess Transfer Company." The defendant, Charles Darnell, is a resident of 315 Cass Avenue, City of Evansville, in the State of Indiana.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars, as hereinafter set out.

II.

For its cause of action herein the plaintiff states that on April 26, 1951, the defendants, by and through their agent, servant and employee the defendant, Charles Darnell, operated a motor vehicle, to-wit, a tractor and flat bed trailer upon which there was loaded a Lucyrus-Erie TD-9 dozer shovel on Kentucky Highway No. 305 in McCracken County, Kentucky, in such a careless and negligent manner as to cause same to run into and strike the railroad bridge of this plaintiff known as J.F.-0-9 located approximately one mile south of Chiles, McCracken County, Kentucky, thereby knocking said bridge and railroad tracks located thereon out of line. Shortly after the striking of said bridge as aforesaid this plaintiff's train consisting of engine No. 6029 and ninety-five (95) cars, sixty-seven (67) of which cars were loaded and twenty-eight (28) of which were empty, in attempting to pass over said bridge was caused to be derailed by the act of the defendants as aforesaid in striking said bridge to the loss and damage of this plaintiff in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars.

Plaintiff further states that all loss and damage herein complained about was and is the direct approximate result

of the negligence and carelessness of these defendants in the operation of the said tractor and trailer as aforesaid.

Wherefore, plaintiff prays judgment against the defendants in the sum and amount of One Hundred Fifty Thousand ($150,000.00) Dollars together with interest thereon from April 26, 1951, and that summonses be awarded against said defendants, summonses for the defendants S. G. Olberding and Charles Darnell to be directed to the United States Marshal for the Eastern District of Kentucky to be served on the Honorable George Glenn Hatcher, Secretary of State, Commonwealth of Kentucky, Frankfort, Kentucky, pursuant to Chapter 188, Kentucky Revised Statutes, Sections 020 and 030 and it prays for its costs herein expended and for all other relief to which it may appear entitled.

Wheeler and Marshall,
By Thos. J. Marshall, Jr.,
Paducah, Kentucky,
Attorneys for Illinois Central
Railroad Company.

SEPARATE AND SEVERAL MOTION OF DEFENDANTS, S. G. OLBERDING, d/b/a VERA TRANSFER COMPANY, AND CHARLES DARNELL, TO QUASH PROCESS AND DISMISS THE ACTION—Filed May 29, 1951.

Come now the defendants, S. G. Olberding, d/b/a Vera Transfer Company, and Charles Darnell, and enter their special appearance herein by and through William L. Mitchell and Charles G. Franklin, their attorneys, for the purpose of this motion and for no other purpose, and respectfully move this Court as follows:

1. That each one of these moving defendants is a resident of the State of Indiana, and reside in the City of Evansville, said state, which is in the Southern District of

Indiana, Evansville Division of the District Court of the United States for that state, and that neither one of these moving defendants were residents of the State of Kentucky at the time this action was commenced or prior to said time, and are not now residents of said State of Kentucky, or of the Division of the Federal District Court therein where this action was commenced.

2. That neither one of these moving defendants waives his rights under and pursuant to the law of the United States to be sued in the District Court of his residence, and insists upon his said right, and on the application of the laws of the United States in respect to venue to this proceeding, and now they each respectfully move this Court for an order dismissing this action as to them, and to each of them, and respectfully show and assert that the complaint of the plaintiff herein discloses that said plaintiff, Illinois Central Railroad Company, Inc., is a corporation created and existing under the laws of the State of Illinois, whereof it is an inhabitant and resident, and that it is a non-resident of the State of Kentucky while said complaint also shows and discloses that these moving defendants each reside in the City of Evansville, State of Indiana.

3. These moving defendants, separately and severally as to each one thereof, and under their special and limited appearance herein, further respectfully move the Court to dismiss this action as to each one and both of said defendants, for the reason and on the ground that no valid service was effected on either thereof, service of process having been caused to be made in this proceeding at the instance of the plaintiff, under and pursuant to Sec. 183.020, and succeeding sections, which provide for service of process in courts of the State of Kentucky against non-resident defendants, which statutes are further designated as Kentucky Revised Statutes, and which sections of statute have no extra territorial force or effect, nor do they apply to the Federal Courts, nor can they serve to confer jurisdiction on Federal Courts which are a dependency on Federal Statutes in respect to jurisdiction and in respect to the service of process in an action originally filed in the Federal Court.

Separate and Several Motion of Defendants, Etc.

That not only do the said statutes of Kentucky apply within the territorial limits of that state to courts within the state, but the civil process of this court in this case is not authorized beyond the district in which the action was commenced, to-wit: the Western District of Kentucky, Paducah Division.

That neither one of these moving defendants have waived the personal privilege which inures to the benefit of them, and each of them, but raise and present their objections to the jurisdiction of this Court over their persons at the first and earliest opportunity, and as the first step in this proceeding, under their special and limited appearance as aforesaid, and respectfully move the dismissal of this action as to them and to each of them.

4. These moving defendants, separately and severally as to each one thereof, and under their limited and special appearance as aforesaid, further respectfully move the Court that the process herein as attempted or made on each one of these moving defendants be quashed, and set aside, and held of no force or effect, for the reason or reasons and on the ground or grounds that the Federal practice and procedure do not entertain nor provide for service in the manner here made, to-wit: Under a statute of the State of Kentucky which provides that any non-resident operator or owner of any motor vehicle who accepts the privilege extended by the laws of the State of Kentucky to non-residents to operate motor vehicles, or have them operated within said state, shall, by such acceptance and by the operation of such motor vehicle within said state, make the Secretary of State thereof his agent for the service of process in any civil action instituted in the courts of such state against such operator or owner arising out of or by reason of any accident or collision or damage occurring within such state and in which the motor vehicle is involved, said statute having no extra territorial force or effect, and having no effect whatsoever on the jurisdiction of the Federal Court or the service of process in an action commenced originally in that court.

Further, for the reason that such a statute can have no force or effect in extending, in favor of the Federal Court,

the power to cause process to be issued and served outside of its district, the Federal Court being a dependency on the Federal Statutes and Federal rules of practice and procedure, and the Federal Judicial Code, for its jurisdiction and for proceedings thereunder.

Further, for the reason that service so attempted or made does not have the effect or force of bringing these moving defendants within the jurisdiction of this Court over their timely objection, and over their timely special and limited appearances under which these objections and motion to dismiss are made.

Further, the service so attempted to be made on these moving defendants, and on each thereof, and so made first, by service on the Secretary of State of Kentucky in another district to said state, to-wit, The Eastern District of Kentucky, than the one wherein this action was filed, and then, second, through the said Secretary of State by registered mail delivered to these moving defendants on the 16th day of May, 1951, in the City of Evansville, Indiana, wherein they have at all times resided, they each, then and at all times herein mentioned, being without the jurisdiction of this Court.

5. Further, that the ground or basis for the invocation of the Federal jurisdiction in this case or proceeding, is diversity of citizenship, that is to say, solely on the ground of diversity of citizenship, coupled with a demand for an amount beyond the jurisdictional requirement in respect to dollars and cents, and these moving defendants may neither be joined in an action in the Western District of Kentucky nor may they be served outside the district and state in the manner here attempted.

6. These moving defendants support this, their motion, by the affidavit of one of their attorneys, hereinafter appearing, and by the affidavit of S. G. Olberding, which is filed and submitted herewith.

Wm. L. Mitchell,
Chas. G. Franklin,
Attorneys for Defendants, S. G. Olberding, d/b/a Vess Transfer Company and Charles Darnell.

Certification

State of Indiana, Vanderburgh County. } ss.

William L. Mitchell, being first duly sworn upon his oath says that he is one of the attorneys for the defendants, S. G. Olberding, d/b/a Voss Transfer Company and Charles Darnell in the above entitled cause, and that he is duly authorized to and does hereby make this affidavit for and in the behalf of said defendants.

Affiant further says that the matters and facts set forth in the above and foregoing motion of said moving defendants are true in substance and in fact as he is informed and verily believes.

Dated and signed at Evansville, Indiana, this 26th day of May, 1951.

Wm. L. Mitchell.

Subscribed and sworn to before the undersigned Notary Public in and for said county and state this 26th day of May, 1951.

Cora G. Huber,
Notary Public.

My commission expires, December 27, 1951.
(Seal)

SUPPORTING AFFIDAVIT—Filed May 29, 1951.

Sylvester G. Olberding, being first duly sworn, deposes and says:

1. That he is a party defendant in the captioned matter and is a co-defendant of Charles Darnell, with whom he has filed his separate and several motion to dismiss this action as to him and his said co-defendant, and to quash and set aside the process and the service thereof as attempted or made in this action.

2. Affiant says that he is a resident of the City of Evansville, Vanderburg County, State of Indiana, now and

that he has been such resident at all times prior to and following the filing of this action against him and his said co-defendant in this court, and that his residence is number 1151 East Walnut Street, in the City of Evansville, said county and state.

3. That his co-defendant, Charles Darnell, now resides, and has resided at all times since the commencement of this action and prior thereto, at 315 Cass Avenue in the City of Evansville, Vanderburgh County, Indiana.

4. That neither this affiant nor his said co-defendant resided in the State of Kentucky, or in the Western District of said state or any where excepting as set out hereinabove, at any time since the commencement of this action, or now or for some years prior to the commencement of said action.

5. That the only service made upon them, or either of them, in this action, was by registered mail, delivered to this affiant and to his said co-defendant by and through that medium, that is to say, through and by means of registered mail, in the City of Evansville, Vanderburgh County, Indiana, wherein they reside and have so resided at all the times herein stated.

6. That this action should be dismissed as to affiant and his said co-defendant, and the process herein set aside and quashed, and the service thereof set aside and quashed, on and by reason of the facts herein stated.

Sylvester G. Olberding.

Subscribed and sworn to before me, the undersigned, a Notary Public in and for Vanderburgh County, State of Indiana, this 26th day of May, 1951.

Cora G. Huber,
Notary Public.

(Seal)

My commission expires December 27, 1953.

MOTION OF ILLINOIS CENTRAL RAILROAD COMPANY—Filed July 17, 1951.

The Illinois Central Railroad Company moves the Court that so much of this action as seeks a recovery against the defendant Brandeis Machinery and Supply Company be dismissed and on this motion prays an order of the Court.

Thos. J. Marshall, Jr.,
Attorney for Illinois Central
Railroad Company,
c/o Wheeler & Marshall,
Paducah, Kentucky.

ORDER AND JUDGMENT—Entered July 17, 1951.

The motion of the plaintiff Illinois Central Railroad Company to dismiss so much of the above styled action as seeks a recovery against the defendant Brandeis Ma- dismissed and on this motion prays an order of the Court. the Court being sufficiently advised,

It is ordered and adjudged that said motion be and the same is hereby sustained.

This 17th day of July, 1951.

Roy M. Shelbourne,
Judge, United States District Court.

ORDER—Entered August 15, 1951.

The motion of the defendant S. G. Olberding, d/b/a Vess Transfer Company and Charles Darnell to quash the process herein and to dismiss said action on the grounds of improper venue coming on to be heard, said matter having been argued orally before the Court and memoranda having been filed herein, the Court having considered said matter and being sufficiently advised,

It is ordered and adjudged that each of said motions be and the same is hereby overruled.

This 15th day of August, 1951.

Roy M. Shelbourne,
Judge, United States District Court.

ANSWER OF INDIVIDUAL DEFENDANTS—
Filed August 29, 1951.

FIRST DEFENSE.

Come now the individual defendants, S. G. Olberding, doing business as Vess Transfer Company, and Charles Darnell, under their special and limited appearance herein, and for their joint and several First Defense to plaintiff's complaint herein, respectfully say:

1. That the plaintiff, Illinois Central Railroad Company, Inc., is a citizen of the State of Illinois and that the said individual defendants herein are residents and citizens of the State of Indiana.

2. That neither the said plaintiff nor the said individual defendants herein are now or have been since the filing of the action herein or at any other time as complained of in plaintiff's complaint herein, either citizens or residents of the State of Kentucky or the Western District of Kentucky, Paducah Division thereof.

3. That the sole remaining defendant herein, the Brandeis Machinery and Supply Company, Inc., is a cor-

poration organized under the laws of the State of Kentucky with its office and principal place of business in the city of Louisville, Kentucky, and is a citizen of the State of Kentucky.

4. That jurisdiction in the civil action herein is founded only on diversity of citizenship and may be brought only in the judicial district where all the defendants are residents or where the plaintiff resides or may be by some provision of law amenable to the jurisdiction of this Honorable Court.

5. That the individual defendants herein respectfully show the court that as individual defendants in the civil action for personal judgment they may be sued only in the United States District Court for the Southern District of Indiana, Evansville Division, and may not be sued where "found" actually or constructively in this or any other Federal jurisdiction.

6. That neither of said individual defendants has waived or does now waive his right to be sued in the district of his residence and has not consented to be sued and does not now consent to be sued in the United States District Court for the Western District of Kentucky and each of said defendants has at all times asserted and does now assert his right as a citizen of Indiana to personal service in an action for personal judgment as by law provided, and has not consented to and does not now consent to accept service made upon the Secretary of State of the State of Kentucky or upon any other officer or person.

7. Each of said defendants admits he may be sued in any State Court within whose jurisdiction he may be found, actually or constructively, but claims the protection of the Federal Act fixing and determining his right to be sued only in the district of his residence, and further denies he may by a statute of the State of Kentucky be deprived of a right granted him by a statute of the United States, to be sued only in his own district or that of plaintiff.

8. That venue as against each individual defendant has been and now is limited to the District of the residence of plaintiff or defendant and may not and does not depend on correlative or concurrent jurisdiction in State Courts.

9. That the suit herein for personal judgment against individuals is differentiated by statutory enactment from local actions and actions in rem, and may not be confused therewith nor conformed to the practice therein.

10. That the venue of an action against a corporation defendant is affected by its voluntarily consenting to be sued in any state where it is doing business and agreeing as a matter of a contract with the State to accept service upon a named party as notice to itself in any action against such corporation.

Each individual defendant respectfully shows the Court he has not filed any such consent, nor received any such grant of authority to do business, or named or agreed to name any such process agent, in this or any other action.

11. That the single and sole test of the waiver of venue in actions against corporate defendants, the voluntary act of appointing a process agent and consenting to be sued in Courts of the state and establishing a place of business in the state, is wholly absent in the instant proceeding in the case of each individual defendant and the cause should in all things be dismissed for want of jurisdiction over the person of the individual defendants and each of them and of the cause of action as to them in the particular suit herein should be held and adjudged without the jurisdiction of this Honorable Court.

Wherefore, the individual defendants, S. G. Olberding, d/b/a Vess Transfer Company, and Charles Darnell, separately and severally pray the Court for an order dismissing the action as to them and each of them and quashing the Notice of the Secretary of State for the State of Kentucky as to these individual defendants and each of them.

Wm. L. Mitchell,
W. C. Melborn,
Milford M. Miller,
Charles G. Franklin,
Attorneys for Individual Defendants,
S. G. Olberding, d/b/a Vess Transfer Company, and Charles Darnell.

Answer of Individual Defendants

SECOND DEFENSE.

The joint and several Second Defense of the individual defendants, S. G. Olberding, doing business as Vess Transfer Company, and Charles Darnell, to the complaint of the plaintiff above named, respectfully shows that the complaint fails to state a claim against said defendants or either of them upon which relief can be granted.

THIRD DEFENSE.

The individual defendants, S. G. Olberding, doing business as Vess Transfer Company, and Charles Darnell, separately and severally admit the allegations contained in Paragraph One of plaintiff's complaint herein and said defendants each separately and severally deny each and every other allegation contained in the plaintiff's complaint herein.

Wherefore, the individual defendants and each of them, separately and severally pray the court for judgment that the complaint of plaintiff be dismissed with costs to the plaintiff.

Dated August 29, 1951.

Wm. L. Mitchell,
W. C. Melborn,
Milford M. Miller,
Charles G. Franklin,
Attorneys for Individual Defendants,
S. G. Olberding, d/b/a Vess Transfer Company, and Charles Darnell.

MOTION TO STRIKE FROM THE ANSWER—
Filed September 17, 1951.

The plaintiff, Illinois Central Railroad Company, moves to strike from the answer of S. G. Olberding and Charles Darnell numbered paragraphs two through eleven inclusive contained in the first defense of said answer and for reasons for said motion it states that all matters contained in said numbered paragraphs two through eleven in the first defense are a reiteration of said defendants' motion to dismiss this action and to quash the service of process herein, all of which have been ruled on by this Court adversely to the contentions of said defendants; and that same does not constitute a defense to plaintiff's cause of action against said defendants and upon this motion the plaintiff prays the judgment of the Court.

Thos. J. Marshall, Jr.,
c/o Wheeler & Marshall,
Paducah, Kentucky,
Attorneys for Illinois Central
Railroad Company.

I hereby certify that I have this day mailed a copy of the foregoing motion to the Hon. William Mitchell and the Hon. Charles Franklin, Attorneys for the defendants. This 17th day of September, 1951.

Thos. J. Marshall, Jr.,

MOTION FOR LEAVE TO FILE—Filed September 29, 1951.

The individual defendants, Charles Darnell, and S. G. Olberding, doing business as Vess Transfer Company, respectfully move the Court for leave to file the attached Fourth Paragraph of Defense in the above entitled cause.

Wm. L. Mitchell,
Charles G. Franklin,
Welborn & Miller,
Attorneys for Individual Defendants,
Charles Darnell and S. G. Olberding d/b/a Vess Transfer Company.

ANSWER OF INDIVIDUAL DEFENDANTS—Tendered September 29, 1951; filed October 18, 1951.

FOURTH DEFENSE.

The individual defendants, Charles Darnell, and S. G. Olberding doing business as Vess Transfer Company, separately and severally as to each thereof for their further and fourth defense herein, allege and say:

1. That the defendants and each of them used due care and diligence in the operation of their motor vehicle to-wit: The tractor and flat-bed trailer upon which was loaded the Bucyrus-Erie Bulldozer shovel on Kentucky Highway number 305 in McCracken County, Kentucky, on April 26, 1951.

2. And, said defendants and each of them allege that the damage complained of in plaintiff's complaint, if any, was not caused by any negligence on the part of the said defendants or either of them but was owing to and resulted from the negligence and fault of the plaintiff, Illinois Central Railroad Company, Inc., itself, its agents and employees.

Wm. L. Mitchell,
Charles G. Franklin,
Welborn & Miller,
Attorneys for Individual Defendants,
Charles Darnell and S. G. Olberding d/b/a Vess Transfer Co.

OBJECTION TO FOURTH DEFENSE—Filed October 10, 1951.

The plaintiff, Illinois Central Railroad Company, objects to the filing of the so-called Fourth Defense of the defendants, S. G. Olberding and Charles Darnell for the reason that said Fourth Defense contains no matter of defense to plaintiff's complaint and on this it prays the judgment of the court.

Thos. J. Marshall, Jr.,
s/o Wheeler & Marshall,
Citizens Savings Bank Bldg.,
Paducah, Kentucky.

I hereby certify that I did on the 9th day of October, 1951, mail copy of the within motion to William A. Mitchell, Welborn and Mitchell, and to Hon. Charles Franklin, Attorneys for the defendants.

Thos. J. Marshall, Jr.,

MOTION OF CHARLES DARNELL TO DISMISS THE ACTION FOR NON-JOINDER OF INDISPENSABLE PARTY AND WANT OF JURISDICTION OF THE ACTION—Filed October 11, 1951.

The defendant, Charles Darnell, moves the Court for an order to dismiss the action herein because:

1. There is non-joinder of an indispensable party defendant and,

2. Neither plaintiff nor defendant reside within the jurisdiction of the United States District Court for the Western District of Kentucky.

In support and for ground of assignment No. 1, defendant respectfully shows the Court:

(a) The complaint alleges negligence in the operation of a tractor and flat bed trailer upon which was

hauled a Bucyrus-Erie 22-B Dragline shovel on Kentucky highway No. 305 in McCracken County, Kentucky.

(b) In transporting the said machinery and equipment from the city of Louisville to the city of Paducah, both in the state of Kentucky, defendant was under the orders and direction and operated as the agent and employee of the defendant, S. G. Gheading.

That beyond said city of Paducah the said Reynolds Machinery & Supply Company, Inc. solely and alone ordered and directed the defendant in the transporting of the said machinery and equipment of the Reynolds Machinery & Supply Company, Inc. from the city of Paducah to a point on the Ohio River, approximately fifteen miles west of the said city, over the said highway No. 305.

(c) That upon arrival in the City of Paducah, on the 28th day of April, 1951, the defendant contacted the managers of the said Reynolds Machinery and Supply Company, Inc. for instructions as to where in Paducah he was to unload the said machinery and equipment of the said company, and was directed and instructed by the said company to haul the said highway No. 305 to a point some fourteen (14) or fifteen (15) miles west of Paducah, and near the bank of the Ohio River.

(d) That said company and its agents and employees were familiar with said highway and the hazards, if any, of transporting the said machinery and equipment over and upon said highway No. 305, and the defendant was not familiar therewith and relied upon the orders and direction of said company to transport said company's Bucyrus-Erie 22-B Dragline Shovel to a point beyond the original destination and to a sand and gravel company's plant near the Ohio River more than twelve miles west of the original destination at Paducah, Kentucky.

[redacted]

Wherefore, for such and all such reasons, this defendant prays the court to dismiss the action herein at the cost of the plaintiff and for all other proper relief.

William L. Mitchell
William C. Welborn
Milford M. Miller
Charles G. Franklin

Certification

State of Indiana
Vanderburgh County } ss:

Charles Darnell, being first duly sworn upon his oath, says that he is one of the defendants in the matter of Edith Darnell, Illinois Central Railroad Company, Inc., et al., No. [illegible], and that he makes this affidavit in support of the motion and plea of res judicata contained in the above and foregoing motion, and in this action by his attorneys in the matter.

Affiant further says that the motion and facts set forth in and by the said motion are true in substance and in fact as he is informed and fully believes.

Witness the signature of said Charles Darnell hereunto subscribed this 16th day of October, 1951.

Charles Darnell.

Subscribed and sworn to before me, the undersigned, a Notary Public in and for said county and state this 16th day of October, 1951.

Owen O. Bishop,
Notary Public.

My commission expires: December 27, 1952.
(Seal)

ORDER—Entered October 18, 1951.

The motion of the defendant, Charles Darnell, to dismiss the above styled action coming on to be heard, the Court being sufficiently advised,

It Is Ordered and Adjudged, that said motion be overruled.

This the 18th day of October, 1951.

Roy M. Shelbourne,
Judge, U. S. District Court.

[illegible]—Entered October 24, 1951.

[illegible] of the plaintiff to the filing of the Fourth [illegible] Complaint, [illegible] and Charles [illegible] Railway Company, [illegible] Chicago, Rock Island and Pacific Railway Co. [illegible] Fourth Amended Complaint as a plea [illegible]

[illegible] and motion by said [illegible]

[illegible] October, 1951.

Roy M. Shelbourne,
Judge, United States District Court.

[illegible]—Entered October 24, 1951.

[illegible] of the plaintiff, Illinois Central Railroad [illegible] Amended Complaint numbered 2 through 11, [illegible] Paragraph 2 of the Separate Answer of [illegible] Central Railroad Company as to be [illegible] separately stated.

[illegible] said motion be sustained and said [illegible] numbered 2 through 11, inclusive, of the First [illegible] and Answer stricken.

Entered October 24, 1951.

Roy M. Shelbourne,
Judge, U. S. District Court.

ORDER—Entered October 22, 1951.

It Is Hereby Ordered that this action be and the same is set for trial December 17, 1951.

R. M. Shelbourne,
Judge, U. S. District Court.

AMENDED COMPLAINT—Filed in Open Court, December 18, 1951, Over Objection of Defts.

With leave of Court, and in order to conform to the proof, plaintiff amends its complaint, and states:

III.

At the time and on the occasion referred to in the original complaint, eighteen (18) cars, which were a part of said train of ninety-five (95) cars, owned by other common carriers by railroad, were derailed and damaged or destroyed, as the direct and proximate result of the negligent building of said bridge by the defendants, as alleged in the original complaint. Said eighteen (18) cars owned by other railroads were a part of plaintiff's train referred to in the complaint. Pursuant to the practice and custom of such common carriers by railroad in the United States, complainant was required to and did incur expense of repair work done by it, or by the owners, on such cars as could be repaired, and became liable to and paid to the owners of such cars as were destroyed, the value thereof. The plaintiff was required to and did pay to the owners of said cars, on account of the value of cars destroyed, and repair of cars which could be repaired, a total sum of $41,310.52. The amount of damages in the sum of $41,310.52 for damage to and destruction of cars owned by other carriers directly and proximately resulting from the negligence of the defendants, as alleged in the original complaint. The loss and damage to cars owned by other carriers and derailed at the time and place mentioned in the complaint was not less than $41,310.52.

IV.

It states that at the time and on the occasion referred to in the complaint, that eighteen (18) of the twenty-three (23) cars which were derailed, were loaded with goods and merchandise shipped by the owners thereof, and in the hands of this plaintiff as a common carrier. It states that it was liable to the owners of the goods and merchandise in said eighteen (18) cars for loss, damage and injury to such goods and merchandise. Subject to certain exceptions not applicable herein, it was liable as an insurer to the owners of the contents of said derailed cars. Such freight, lading and contents were damaged, lost and destroyed, as the direct and proximate result of the negligence of the defendants referred to in the orginal complaint, and as a direct and proximate result of said negligence plaintiff became liable to the owners of said goods and merchandise, and paid to said owners the amount of lawful claims made by them, amounting to a total of $43,501.51. In addition to the above amount, which it was required to pay, and has paid, to the said owners of the goods, lading and contents of said cars, it is liable to and will be required to pay on account of additional loss of lading or contents of said cars, the sum of $2,690.00, making a total of $46,191.51, loss which it has incurred on account of loss and damage to the contents of said cars.

V.

All of the allegations of its original complaint are adopted and made a part of this amended complaint. The items of loss herein set out were a part of the total loss and damage prayed for in Paragraph II of its original complaint.

Wherefore, plaintiff prays for judgment against the defendants in the following sums and amounts:

1. For damages on account of damage to and loss of cars of other common carriers, $41,310.52;

2. For damage on account of loss of and damage to shipments in said derailed cars, $46,191.51;

Amended Complaint

3. For damage to property of the plaintiff and expense incurred by it on account of said wreck and derailment, $62,497.97.

And it prays as in its original complaint.

James G. Wheeler,
Thos. J. Marshall, Jr.,
c/o Wheeler & Marshall,
901-5 Citizens Savings Bank Bldg.,
Paducah, Kentucky,
Attorneys for Plaintiff.

Filed December 14, 1951; Read into record on Dec. 18, 1951

DEPOSITION ON BEHALF OF PLAINTIFF—Filed December 14, 1951. Read into record on Dec. 18, 1951, in trial of this case.

APPEARANCES:

For the Plaintiff:

Thomas J. Marshall, Jr.,
Wheeler & Marshall, Paducah, Ky.

For the Defendants:

William L. Mitchell,
W. C. Welborn, Evansville, Ind.

The deposition of Charles Darnell, one of the defendants in the above styled action, taken on behalf of the plaintiff, on October 16, 1951, at 2 P. M., at the law offices of Wheeler & Marshall, 901 Citizens Savings Bank Building, Paducah, Kentucky, said deposition being given by the witness pursuant to order of this Court, the time and place of taking having been agreed upon by counsel for plaintiff and defendants.

Testimony of Charles Darnell

The deposition is taken for the purpose of discovery, or for use as evidence, or for both purposes, in the above styled action.

The reading of the deposition to the witness and his signature to said deposition is by the witness waived.

CHARLES DARNELL, being duly sworn, deposes as follows:

By Mr. Thomas J. Marshall, Jr.:

1. Your name is Charles Darnell?
A. Yes.
2. Where do you live?
A. 315 Cass Avenue, Evansville, Indiana.
3. How long have you lived in Evansville?
A. I have lived there since I was six years old, and I am fifty-four.
4. Are you employed?
A. Yes.
5. By whom?
A. Vess Transfer Company.
6. How long have you been so employed?
A. I have been there between four and five years this last time.
7. Has that been continuous employment for the past four or five years?
A. Yes.
8. What type of work do you do?
A. I drive a truck.
9. Is that exclusively your job?
A. Yes.
10. Where do you drive?
A. I drive in the City and out of the City.
11. Wherever you are sent?
A. Yes.
12. Were you in McCracken County, Kentucky, on April 26, 1951, that is the County you are now in?
A. Yes.

By Mr. Welborn: May we show at this time that the defendants object to the further questioning of the witness

and to his answers being at this time taken, because it is in pursuance of an order in the pending cause in which the Court is without jurisdiction of the parties, and for that reason we think it is improper for the examination of the defendant to be pursuant. I just want the objection entered.

13. What were you doing in McCracken County on that date?

A. Driving a truck.

14. For whom?

A. For Vess Transfer Company.

15. Who is the proprietor or the owner of the Vess Transfer Company?

A. Sylvester Olberding.

16. What did you have on that truck?

A. I had a caterpillar tractor.

17. Where did you load it?

A. At Louisville, Kentucky.

18. On what date?

A. I loaded it that same day; I don't recall the date.

19. You later collided with a railroad underpass did you not?

A. I did, at Paducah—out of Paducah.

20. In McCracken County?

A. Yes.

21. You loaded the caterpillar you refer to on the same day you had the collision with the underpass referred to?

A. Yes.

22. At what point in Louisville did you load it?

A. At Brandeis' place in Louisville; I don't know where it is located.

23. In their yard or place of business?

A. Yes.

24. Who directed you to go to Louisville?

A. My foreman, Mr. Olberding.

25. Was anybody with you from Louisville to Paducah?

A. No.

26. Where were you directed to take this load?

A. To Paducah, Kentucky.

27. Who directed you to do that?

A. My boss, Mr. Olberding.

28. Where, in Paducah, were you directed to take it?

A. To Smiley Sand & Gravel Company at Paducah.

29. About what time did you arrive in Paducah?

A. I arrived here around four o'clock in the afternoon.

30. What did you do after you got here?

A. I drove around over on the river and inquired at all those sand and gravel companies where the Smiley Sand & Gravel Company was.

31. Did you at any time get in touch with anybody connected with Brandeis' office in Paducah?

A. Yes.

32. Whom did you talk with?

A. Mr. Ball.

33. Was that in the day time or night?

A. Late in the evening, just getting dusk.

34. Did you have a conversation with Mr. Ball?

A. Yes.

35. What was the nature of the conversation?

A. Mr. Ball told me to take that caterpillar—I asked him where Smiley Sand & Gravel Company was and he said it was way down below Paducah, and he said to take 358 until you get out to about five miles, and you come to a grocery on the right hand side, and then he said to turn right there at the grocery and go on out to where the road comes to a dead end and turn to the right and go on in to the Smiley Sand and Gravel Company.

36. Did you do that?

A. I went as far as the underpass.

37. What happened there?

A. Well the road was so rough I was down in second gear to drive around there and I had turned a bend and just as I got to it, I was driving slow, about that much of it bumped the top, and it stopped right then, and I got my truck out of gear and got out and looked and seen about that much of it—

38. How much is that?

A. About an inch and a half.

39. Of the top of the caterpillar?

A. The caterpillar prongs that stuck up.

40. Is it a front loading shovel affair?

A. Yes.

41. Two arms with a bucket on them?

A. Yes.

42. When they were raised did it cause the arms or the prongs to stick up?

A. Not the prongs. They are stationary.

43. They stay up all the time?

A. Yes.

44. Was that the portion of the load or caterpillar that struck the underpass?

A. Yes.

45. When you got out and looked where was your load with relation to the underpass?

A. The load was sitting on the flat bottom trailer and the two prongs were right against the bottom part of the iron.

46. The beam?

A. Yes.

47. Resting against it or under it?

A. Resting against it.

48. On the outside of it?

A. Yes.

49. Are you familiar with directions here?

A. No.

50. You were going from Paducah opposite from the direction you came into Paducah were you not?

A. Yes.

51. So if you had come into Paducah from the East you were travelling West?

52. The point where you struck this underpass would be on the East side of the underpass?

A. Yes, the East side of the underpass.

53. Did you come into Paducah on Route 60 from Louisville?

A. No, I came in on 41, into—I believe this side of Henderson, where it makes a "Y."

54. How did you go from Louisville?

A. I went back to Evansville.

55. That's down the Indiana side from Louisville to Evansville—through Indiana?

A. Yes.

56. Where did you get your instructions at the time you left Evansville to go to Louisville, or at the time you went back from Louisville to Evansville?

A. At the time I left from our office, Mr. Olberding told me to go to Louisville and pick up the caterpillar and bring it to Paducah.

57. Did you see him after you went back?

A. Yes, when I came back through Evansville, yes.

58. Why did you come back through Evansville?

A. It was a better road, and I know it well enough and didn't know the road in Kentucky.

59. You came from Evansville to Henderson and on to Paducah on that highway?

A. Yes, I came under the viaduct out of Henderson.

60. And on through Morganfield, Sturgis, and Marion, and across the Cumberland and Tennessee Rivers?

A. Yes.

61. You say you got out after you struck the underpass and looked at it; what did you do?

A. I said "Well I can't get under here I know" and I got back in my truck and backed down to the corner and turned around, about a half a square down there.

62. Where did you go then?

A. I went back to Paducah at Brandeis Company.

63. Did you know where their place of business was?

A. Yes.

64. You had been there before?

A. Yes.

65. When?

A. I had been there a couple of times before, hauling stuff there.

66. From Louisville?

A. No, from Evansville.

67. How many trips had you made from Evansville to Paducah?

A. I believe two trips is all I made.

68. Prior to this one?

A. Yes.

69. Both trips had been for Brandeis, hauling machinery for Brandeis?

A. Yes.

70. On both those occasions had you gone to the Brandeis office or yard here in Paducah?

A. Yes.

71. What type of equipment were you driving?

A. I was driving a Chevrolet tractor with a flat bottom trailer.

72. Describe the trailer?

A. Well it is just an ordinary flat bottom trailer.

73. The same as one of these Cargo systems, with the sides and top off?

A. The sides and top are off but its not as high.

74. What size tires does it have?

A. I don't know.

75. What size wheels?

A. I don't know.

76. Is it a low-boy?

A. No.

77. It is higher than a low-boy?

A. Yes.

78. What was the length of this tractor and trailer?

A. I don't know.

79. Do you know the width of it?

A. No.

80. Do you know the height of the load?

A. No.

81. Do you have any idea of the height of that shovel?

A. No.

82. What time did you leave Louisville?

A. Well I couldn't tell you exactly.

83. Approximately?

A. I don't remember what time I got there or left there, because I just light out and go and never look at a clock, and I load up and come on away.

84. After you got back to Brandeis' yard after striking the underpass did you talk with anybody connected with Brandeis?

A. Yes.

85. Who?

A. Mr. Ball—no, I talked to his wife.

86. Where was he?

A. Mr. Ball's wife said he was in some conference somewhere with somebody.

87. You called the home?

A. Yes, and a little later I left a telephone number, and she said she would have somebody call me, and I believe somebody from Smiley Sand & Gravel Company told me to take it to Brandeis yard and unload it there and I taken it over there that night after I left from out there, and I stayed all night, until the next morning, and the Brandeis man came and took a bulldozer and shoved up some dirt and I backed against it and he got on the caterpiller and drove it around and parked it, and I went on back to Louisville.

88. What for?

A. To get another caterpillar and take it to Evansville.

89. For Brandeis?

A. Yes.

90. What did you tell Mrs. Ball, if anything?

A. I asked if Mr. Ball was there and she said he wasn't, that he was in conference somewhere, and I said "Well I can't get under the underpass and there is no way I can unload" and she says "Well you wait and I will have somebody call you."

91. Was anyone around that underpass either at the time you hit it or immediately after; did you have a conversation with anybody out there?

A. Yes, with two men about a half a square away from it where I backed up and turned around.

92. At a Country Church?

A. Yes, I believe it was.

93. Was your trailer uncoupled after you struck the underpass?

A. No.

94. You say you were in second gear at the time you struck it?

A. Yes.

96. Why?

A. On account of the roads.

96. What was wrong with the roads?

A. So rough.

97. Full of holes?

A. Yes, and I had to make them short turns, and when there is something or other like that you could turn over, and I drive carefully when I am loaded like that.

98. Was there anything but the shovel on there?

A. No.

99. It occupied the whole trailer?

A. No.

100. Was there room for another shovel on there?

A. No.

101. You never did get under the underpass with the shovel then?

A. No.

102. Do you have Kentucky operator's license?

A. No.

103. Does that truck you were operating have Kentucky license on it?

A. No, not that I know of.

104. Do you know a man named Mahan, employed by Mr. Olberding?

A. Yes.

105. Was he with you at the time of this accident?

A. No.

106. What is Mr. Mahan's employment?

A. He is office boy.

107. In Evansville?

A. Yes.

108. Did you have any type of bill of lading or shipping instructions with you relative to this shovel?

A. No.

109. Did you have a paper to be signed by Smiley Sand and Gravel Company or any representatives, on delivery?

A. No.

110. Did Brandeis pay you for hauling for Mr. Olberding, or did he pay Mr. Olberding direct?

A. I don't know, they didn't pay me.

111. About what time of the evening was it when you struck the underpass, when you got to that point?

A. It was dark enough that I had to have my lights on.

112. Did you see the underpass as you approached it?

A. Yes.

113. Do you know the height of that underpass?

A. I didn't at that time; there wasn't any sign of any kind there.

114. Have you measured it since you struck it?

A. No.

115. Have you been there when anybody measured it?

A. No.

116. Have you been told what the height was?

A. Eleven feet and six inches I believe.

117. Eleven feet and a half is your best recollection?

A. Yes.

118. Your load was about two inches higher than that?

A. I wouldn't say two inches—about an inch and ½ I judge.

119. What property do you own?

A. I don't own any.

120. You own no real estate?

A. No.

121. Do you own a car?

A. No; I'm just a poor boy.

122. You referred to this thing as a caterpillar—it was a Bucyrus bulldozer shovel was it not?

A. Yes, not what you call a bulldozer—just a regular shovel.

123. A front loading affair, operated from the front end?

A. Yes.

124. There was no scraper on it?

A. No, it didn't have any scraper.

By Mr. W. C. Welborn:

124. You say that someone told you about the height of the underpass since the accident?

A. Yes.

125. Did someone tell you or did you see a sign out there?

A. I seen a sign.

126. Did that sign say 11.4 inches?

By Mr. Marshall: The sign speaks for itself.

A. That was 11.4 inches—now I remember seeing it today. I didn't mean to say that someone told me. I meant to say seen it today.

127. There was no sign out there when you went out there before you there?

A. No.

128. There is one there now?

A. Yes.

129. This machinery you described—that was one and a half to two inches that hit this underpass?

A. Yes.

130. If that is 11.4 the underpass was less than 13 feet and six inches?

A. Yes. I came under the Henderson viaduct on 41 and cleared that good.

131. Do you remember the height of it?

A. No.

By Mr. Marshall:

132. Is it painted on it?

A. Yes.

133. You went out there today?

A. Yes.

134. You didn't look at that?

A. I didn't pay any attention to the sign.

State of Kentucky, }
County of McCracken. } ss.

I, Clarice Jacob, a Notary Public within and for the State of Kentucky at Large, do hereby certify that the foregoing deposition was taken by me at the time and place and for the purposes stated in the caption; that the witness

[illegible]

Certification

[illegible] that the foregoing [illegible] contains a true and complete transcript of my shorthand notes of the testimony so taken by me [illegible] and correctly [illegible] the caption.

My commission expires on the 16th day of February, 1965.

Witness my hand and official seal this the 27th day of October, 1964.

Charles Jacob,
Notary Public, State of Kentucky
at Large.

(Seal)

[illegible]

[illegible]—Filed February 8, 1965.

December 17, 18 and 19, 1963,
Paducah, Kentucky.

Court before:

Honorable Roy M. Shelbourne, United States District Judge for the Western District of Kentucky, with a jury.

APPEARANCES:

Mr. James G. Wheeler and Mr. Thomas J. Marshall, for the plaintiff;

Mr. W. L. Hilsbeth and Mr. W. C. Withers of Brownsville, Indiana, and Mr. Joseph Prothrow, for the defendants.

LOYCE THOMPSON was called as a witness by counsel for the plaintiff, and after having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Marshall.

Q. Your name is Loyce Thompson
A. Yes, sir.

Testimony of Loyce Thompson

Q. Are you the Mr. Thompson referred to by the Reverend Weaver and Mr. Turner?

A. Yes, sir.

Q. Where do you work, Mr. Thompson?

A. State Highway Garage.

Q. What is your work?

A. Work out in the Garage, 22nd Street.

Q. Were you present at the Palestine Church on the occasion when the underpass over the highway there was struck?

A. Yes, sir.

Q. What attracted your attention, if anything, to the fact it had been struck?

A. Well, I heard a crash. I thought it was a couple of gravel trucks crash together out there, lots of heavy trucks on the road that night. I looked out the window and I saw these signal lights on the truck of the underpass. I made the remark to Mr. Turner, "Somebody has hit the trouble over there."

Q. Did you go down there or did you go out of the church?

A. Yes, sir, I went out. I started down there and I saw the man get back in the truck, backed out from under the bridge and I walked down in front of the pavement and he backed out.

Q. Did you have any conversation with him?

A. I talked to him a little.

Q. What did he say to you?

A. Well, when he backed up there and got out of the truck, there was another man stopped there I didn't know, and he asked us if we heard him hit the bridge, and I said "Yes, I heard you." He said "Well I hit it a 'jimer,' it like to broke my neck." I said, "Yeah, it sounded pretty bad where I was."

Q. What type of truck was this? Describe the truck.

A. It was a tractor. I thought—I could be mistaken, I thought it was a Chevrolet tractor pulling a flat-bed trailer.

Q. What was on it?

A. There was a high-lift or a dozer, best I remember

had a pan on it.

Q. How was it fastened to the bed of the truck, you remember?

A. Yes, sir, I saw him looking at it, I think it was chained to the flat-bottom of the truck.

Q. Did this man tell you where he was going?

A. Yes, sir, he did.

Q. Where did he say?

A. He said he was trying to get down on the river to Smiley Sand and Gravel. I told him how he could go around and detour and stay out from the underpasses.

Q. Were you able to see whether or not the tractor or the load went under the bridge?

A. No, not from the house, I couldn't, not from the Church.

Q. Did he make any statement to you whether he went under or did he just say that he hit it?

A. He just said he hit it.

Cross-examination by Mr. Welborn.

Q. Mr. Thompson, how long have you been with the Highway Department?

A. Four years.

Q. You have been familiar with this particular trestle for four years?

A. Yes, sir.

Q. Where does that road lead to?

A. Well, it goes into the river—what we call the Old Ferry Landing, Ogden Landing.

Q. How close is it to the Atomic Energy Plant?

A. This railroad?

Q. No, the highway.

A. Well, it runs right down beside of it.

Q. And that is highway 305?

A. I think that is right.

Q. Is that a State highway?

A. Yes, sir.

Q. Were there any signs up at this trestle the night of the accident?

A. I couldn't say.

Testimony of Loyce Thompson

Q. Had there been signs up?
A. Yes.
Q. What clearance did they show?
A. I don't remember that.
Q. Had you been out there repeatedly before this time?
A. Yes, I go under that trestle every day.
Q. I am talking about before the accident.
A. I had been under it once that night, going to the church.
Q. But you hadn't observed any signs at that time?
A. I never paid any attention to it, I pass there so often.
Q. What were your duties on the road?
A. I don't work in the road, I work in the garage.
Q. But you did pass back and forth, did you live out there?
A. Yes, sir.
Q. Do you remember whether you observed the trestle at all that night after the truck hit it?
A. Yes, I took a flashlight and looked up there.
Q. What did you observe?
A. I saw two places up on this I-beam, right on the bottom flange where something had hit it and slipped up it a short ways, about that far (indicating).
Q. Had there been other accidents at that trestle before that night?
A. There had been several, years ago.
Q. At that time there was a truck that fastened under there, wasn't there?
A. I don't know whether he got fastened under there or not. He hit it but I don't know whether he got fastened under there or not.
Q. What did you observe this particular night about the condition of the stringers, were they out of place or in place?
A. I don't remember looking at the stringers. The track was knocked over out of line.
Q. Where did you look at the track?
A. About half way under the trestle, down South

where the trucks of this car were setting off the track.

Q. Where the trucks were sitting off. They were sitting off when you were under there right after this hit, were they?

A. I didn't look at it then. I looked at it after the train wreck.

Q. I am asking you if you didn't look at the stringers after this truck hit?

A. No.

Q. Didn't you state to Mr. Thompson that you climbed upon this machine and examined those stringers with flashlight?

Mr. Marshall: Object.

The Witness: No.

Q. Did you not at that time make a statement that the stringers were in place?

A. I didn't.

Q. That you observed no damage to them at all?

A. I didn't.

Q. Didn't you at that time make the statement that if there had been any damage you would have notified the dispatcher?

A. No, sir. I said if I had had any idea that the track had been knocked out of line, I would have notified the dispatcher.

Q. So you didn't see it was out of line until after the train went off?

A. No, I didn't.

Q. And then where was it out of line, what point?

A. At the South end of the trestle.

Q. As far as the middle of the trestle was concerned, you never saw it was out of line, did you?

A. I didn't look at it. I just looked up there with a flashlight. From underneath, I couldn't see it.

Q. Well, after the accident did happen, cars were standing on that track entirely across the trestle, weren't they?

A. Almost I believe. One car was right across the highway.

Q. What time was that you saw this car across the

highway?

A. Right after the train wreck.

Q. Wasn't it at the South end with one of the trucks derailed—that was at the South end, wasn't it?

A. Yes.

Q. And then beyond that, the cars extended clear across the trestle, didn't they?

A. They did, on the North end.

Q. That's what I am talking about. So, that any change in the alignment of the track was right there at the South end when you saw it?

A. That is all I looked at.

Q. And that was after this wreck occurred and the rails were torn off up further South, weren't they?

A. Yes, they were.

Mr. Welborn: That's all.

S. W. PETERS was called as a witness by counsel for the plaintiff, and after having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Marshall.

Q. Will you state your name, please.

A. S. W. Peters.

Q. Where do you live, Mr. Peters?

A. Evansville, Indiana.

Q. By whom are you employed?

A. Brandeis Machinery and Supply Company.

Q. In what capacity?

A. Office engineer.

Q. Do you know Mr. Olberding?

A. Yes.

Q. Did you or not on or about the 25th or 26th day of April, 1951, negotiate a contract with Mr. Olberding or his firm?

A. Yes.

Q. What was the nature of that contract?

A. To transport this crawler-tractor from Louisville to Paducah area, job site.

Q. To whom was this tractor consigned?

A. Smiley Sand & Gravel Company, I believe.

Q. Were any instructions given by you to the Vess Transfer Company relative to the delivery of the tractor?

A. Yes, I told him to pick the tractor up at Louisville, bring it to Paducah, contact our office here for instructions as to where to take the tractor.

Q. Do you have a representative in Paducah?

A. Yes.

Q. And an office here?

A. Yes.

Q. With whom was this contract negotiated, what individual?

A. I talked with Mr. Mahan in the office first, and I believe I later talked with Mr. Vess or Mr. Olberding.

Q. Describe this equipment he was to transport, had you ever seen it, or a similar type?

A. It is what is known as a front-end loader, crawler-tractor with loader mounted on the tractor, which digs and loads.

Q. Ditches and loads?

A. Excavates and loads.

Q. Did you say crawler-type?

A. That's right.

Q. What do you mean by that?

A. It is mounted on steel pads, which—

Q. Is it what we refer to as caterpillar type?

A. No.

Q. I understand that is a different make.

A. That is a competitive make, which was an International, crawler-tractor.

Q. I meant from the standpoint that it is self-propelled.

A. Same type.

Q. And is the method of movement practically—

A. Very similar.

Q. Referred to as a caterpillar tread.

A. That's right, caterpillar tread.

Q. Was this transportation—how was Mr. Olberding to be compensated for this transportation?

A. A contract price for the entire job.

Q. And that involved the movement of the machine from Louisville to the Smiley Sand & Gravel Company?

A. That's right.

Q. What date was it to be delivered?

A. I believe it was April 26th.

Mr. Marshall: You may ask him.

Cross-examination by Mr. Freeland.

Q. Your company was formerly a defendant to this suit, were they not?

A. I believe that's correct, I am not sure.

Q. As to them, the suit has been dismissed, has it not?

A. I think that's correct, I don't know for sure.

Mr. Marshall: Object.

By the Court: Overruled.

Q. Do you know why it was dismissed as to your company?

Mr. Marshall: Objection.

By the Court: Sustained.

Mr. Freeland: That's all.

ALLEN BALL was called as a witness by counsel for the plaintiff, and after having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Marshall.

Q. Will you state your name, please.

A. Allen Ball.

Q. Where do you live, Mr. Ball?

A. I live in Paducah.

Q. By whom are you employed?

A. Brandeis Machinery & Supply Company.

Q. Where?

A. As manager of the local branch here.

Q. In Paducah?

A. In Paducah.

Q. Did you on or about April 26, 1951, have any conversation with Mr. Darnell relative to the movement of a piece of equipment?

A. Yes.

Q. What type of conversation did you have, I mean was it a personal conversation or—

A. I had a telephone conversation with the gentleman who said he was Mr. Darnell, asking for directions to the Smiley job.

Q. Where were you when you were called?

A. Irvin Cobb Hotel.

Q. Do you recall about the time of day this was?

A. I had two conversations, the first about six-thirty, the best of my memory.

Q. Did you or not direct him to the Smiley Sand and Gravel Company?

A. I told him how to reach the place, yes.

Q. Had you previously been informed by anyone of this shipment?

A. I had conversation about it. I directed the shipment to be made to the Smiley job from Louisville.

Q. You mean with your Louisville office?

A. With my Evansville office.

Q. Where did you tell Mr. Darnell to go, Mr. Ball?

A. I directed him how to reach the job where Mr. Smiley was working. I have forgotten the exact directions, it is toward the TVA plant.

Q. You say you had a later conversation with him?

A. Yes.

Q. Do you know about what time that was?

A. Best I can determine, it was around seven-forty.

Q. The same evening?

A. The same evening.

Q. What was the substance of that conversation?

A. He advised me that he couldn't negotiate an underpass that he had encountered on that road, and I advised him then if he couldn't get through to unload the tractor at that point, inasmuch as it was evidently very close to the job, and we would arrange some other way to get it there. He said he didn't have any way to unload it, so I told him to bring it back to our plant and unload it in the yard.

Q. Where is that yard located?

A. It is on 45 by-pass, near North 8th Street.

Q. Was the equipment brought to your yard and unloaded?

A. I found it there the next morning.

Q. Was Mr. Darnell there?

A. No.

Q. But the equipment was.

A. The equipment was on the yard.

Q. Do you know who unloaded it?

A. No, sir.

Mr. Marshall: That's all.

Cross-examination by Mr. Mitchell.

Q. Mr. Ball, you say you were at the Cobb Hotel the first time he called you?

A. Yes, sir.

Q. And you told him how to go to get to Smiley Sand & Gravel Company?

A. That's right.

Q. You recall the exact instructions that you gave him?

A. I don't believe I could.

Q. Do you recall whether or not you told him to take Highway 385 to its junction with 305, where there was a grocery store and to turn right there?

A. No, sir, I don't remember just exactly what my directions were.

Q. You knew that this trestle or underpass existed on that route, didn't you?

A. I did not, no, sir.

Q. You have since seen it, have you not?

A. Yes, sir.

Q. How long after the collision was it before you saw it?

A. I imagine it was the next day—I believe.

Q. Did you observe any damage to it?

A. I would like to retract that last statement—I don't believe it was the next day that I saw that bridge. On second thought, I don't believe it was, because when I saw the bridge, it had been repaired.

Mr. Mitchell: That's all.

Redirect Examination by Mr. Marshall.

Q. Mr. Ball, did you examine the equipment out in the yard of the plant of Brandeis, in Paducah?

A. The next day I examined it superficially—not a thorough examination—examined it somewhat.

Q. Did it bear any marks of having been struck or having struck any object?

A. There was a place broken in back of the equipment that held the upright digging apparatus. However, that appeared to be minor at the time.

Mr. Marshall: That's all.

State of Kentucky
County of Jefferson

I, Helen M. Whedon, Official Reporter for the United States District Court for the Western District of Kentucky, hereby certify that the foregoing is a true, correct and complete transcript of the witnesses' testimony set forth herein; that such proceedings were reported by me at the time and place set forth herein in shorthand and also on an electric recording machine, and later transcribed by me on a typewriter.

I further certify that I am not related by blood or marriage to any of the interested parties hereto, and am in no way interested in the outcome of same.

Given under my hand as Reporter aforesaid, this the 8th day of February, 1952.

Helen M. Whedon,
Reporter.

Proceedings

December 17, 18 and 19, 1951,
Paducah, Kentucky.

Heard before:

Honorable Roy M. Shelbourne, United States District Judge for the Western District of Kentucky, with a jury.

APPEARANCES.

Mr. James G. Wheeler and Mr. Thomas J. Marshall, for the plaintiff;

Mr. W. L. Mitchell and Mr. W. C. Welborn of Evansville, Indiana, and Mr. Joseph Freeland, for the defendants.

At the conclusion of the introduction of the testimony for the plaintiff, the following proceedings were had:

Mr. Mitchell: All right, let it be stipulated then as a part of the evidence in this cause that the Illinois Central Railrod Company, plaintiff, is a citizen of the State of Illinois, and that the individual defendants, S. G. Oberding, doing business as Vess Transfer Company, and Charles Darnell are each and both of them citizens of the State of Indiana, and reside in the City of Evansville of said State.

Mr. Welborn: I don't believe that stipulation is correct—at the time of the filing of the action here.

By the Court: And at all times since and now.

State of Kentucky }
County of Jefferson }

I, Helen M. Wheelon, Official Reporter for the United States District Court for the Western District of Kentucky, hereby certify that the foregoing is a true, correct and complete transcript of the proceedings set out herein; that such proceedings were taken by me at the time and place set forth in the caption hereof in shorthand and also on an electrical recording machine and later transcribed by me on a typewriter.

I further certify that I am not related by blood or marriage to any of the parties hereto, and am in no way interested in the outcome of same.

Given under my hand as Reporter aforesaid, this the 21st day of January, 1952.

Helen M. Whedon,
Reporter.

TRIAL ORDER—Entered December 19, 1951.

On December 17, 1951, came the parties by counsel and announced ready for trial. Plaintiff was represented by Messrs. Wheeler and Marshall, Paducah; defendants by Messrs. W. C. Welborn and W. L. Mitchell, Evansville, Indiana, and Joseph S. Freeland, Paducah. A jury was selected, impaneled, and sworn.

Mr. Marshall stated the case for the plaintiff, Mr. Mitchell for the defendants.

Plaintiff began presentation of its evidence and continued through the day. At five o'clock court adjourned to December 18th, at 9:30.

On December 18th, plaintiff's presentation of evidence was resumed and continued through the day.

On December 19th, trial was resumed. Plaintiff offered to file an amended complaint to conform to the proof, to which objection by defendants was made. Defendants' objection was overruled and the amended answer ordered filed. Same was controverted of record.

It was stipulated by counsel that plaintiff is a citizen of Illinois and defendants at the time of the accident sued on were and are now residents of Indiana, residing at Evansville, Indiana.

Defendants' evidence was then presented and was completed at 2:25 p. m. No rebuttal was presented, and court recessed for conference on instructions until 3:20. Argu-

ment of counsel was made to the jury, the Court's instructions were given, and the jury retired at 4:50 p. m.

Objections made by the parties to the court's instructions, more particularly shown by the reporter's transcript of evidence herein, were overruled by the Court.

At approximately 7:00 p. m. the jury returned to court and read and filed with the Clerk the following verdict:

"We, the jury, find for the Plaintiff damages in the sum of $37,500.00." J. D. Rains, Foreman.

Roy M. Shelbourne,
Judge, U. S. District Court.

JUDGMENT—Entered December 19, 1951.

The jury herein having returned a verdict for the plaintiff, Illinois Central Railroad Company, Inc., against the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell,

It Is Ordered, Adjudged, and Decreed that the plaintiff, Illinois Central Railroad Company, Inc., have and recover of the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell, the sum of Thirty-Seven Thousand Five Hundred ($37,500.00) Dollars with interest thereon at the rate of 6% per annum from date hereof until paid, and its costs herein, for all of which execution may issue.

Roy M. Shelbourne,
Judge, U. S. District Court.

NOTICE OF APPEAL—Filed January 16, 1962.

Notice is hereby given that the above named defendants, S. G. Olberding and Charles Darnell, hereby appeal to the United States Court of Appeals for the Fifth Circuit, from the final judgment entered in this action on the 19th day of December, 1961.

W. [illegible]
[illegible]
[illegible]
[illegible]

W. C. [illegible]
[illegible]
[illegible]
[illegible]

Milford M. Miller,
916 Court Bldg.,
Evansville, Indiana,

Joseph S. Prichard,
Paducah, Kentucky.

A copy of defendants' Notice of Appeal was served on plaintiff's attorney by the Clerk of the Court by mailing same on January 16, 1962.

Certified: W. T. Beckham, Clerk,
By Georgia Mae Nelson, Deputy Clerk.

COST BOND—Filed January 16, 1962.

Know All Men By These Presents, that we, S. G. Olberding and Charles Darnell, as principals and the Travelers Indemnity Company, as surety, are held and firmly bound unto the Illinois Central Railroad Company, Inc., in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to the said appellees, their successors, representatives or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Cont Bond

Dated With Our Bank, and dated this 11th day of Jan-
uary, 1909.

Whereas, lately at the October Term of the United States Circuit Court of Kentucky, in a suit pending in said Court between Illinois Central Railroad Company, Inc., and C. W. Stoutsberry and Charles Darnell, a judgment was rendered against the defendants and the said defendants have duly filed notice of an appeal to the United States Court of Appeals for the Sixth Circuit.

Now, the condition of the above obligation is such that if the said C. W. Stoutsberry and Charles Darnell shall prosecute said appeal with effect and pay all costs, if the appeal is dismissed or the judgment affirmed or such costs as the Court may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and virtue.

C. C. Stoutsberry (Seal)
Charles Darnell (Seal)
Principals.
Travelers Indemnity Co.,
By C. W. Stoutsberry (Seal)
Surety.
(Treasurer Seal)

THE TRAVELERS INDEMNITY COMPANY
Hartford, Connecticut

POWER OF ATTORNEY

Know All Men By These Presents:

That The Travelers Indemnity Company, a corporation of the State of Connecticut, does hereby make, constitute and appoint J. L. Alderson, C. W. Stoutsberry, W. H. Curry, R. L. Myre, Jr., Jesse M. Robins, R. Sullivan, all of Louisville, Kentucky, Each, its true and lawful Attorney(s)-in-Fact, with full power and authority, for and on behalf of the Company as surety, to execute and deliver and affix the seal of the Company thereto; if a seal is required, bonds, under-

Case Deed

bonds, undertakings, recognizances or other written obligations in the nature thereof, as follows:

Any and all bonds, undertakings, recognizances or other written obligations in the nature thereof not exceeding in amount Fifty Thousand Dollars ($50,000) in any single instance.

and to bind The Travelers Indemnity Company thereby, and all of the acts of said Attorney(s)-in-Fact, pursuant to these presents, are hereby ratified and confirmed.

This appointment is made under and by authority of the following By-laws of the Company which By-laws are now in full force and effect:

Article IV, Section 8. The Chairman of the Board, the President, any Vice President, and Secretary or any Department Secretary may appoint attorneys-in-fact or agents with power and authority, as defined or limited in their respective powers of attorney, for and on behalf of the Company to execute and deliver, and affix the seal of the Company thereto, bonds, undertakings, recognizances or other written obligations in the nature thereof and any of said officers may remove any such attorney-in-fact or agent and revoke the power and authority given to him.

Article IV, Section 11. Any bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when signed by the Chairman of the Board, the President or any Vice President and duly attested and sealed, if a seal is required, by any Secretary or any Department Secretary or any Assistant Secretary, or when signed by the Chairman of the Board, the President or any Vice President and countersigned and sealed, if a seal is required, by a duly authorized attorney-in-fact or agent; and any such bond, undertaking, recognizance or written obligation in the nature thereof shall be valid and binding upon the Company when duly executed and sealed, if a seal is required, by one or more attorneys-in-fact or agents pursuant to and within the

[illegible]

Cost Bond

Notice of the authority granted by his or their power or powers of attorney.

In Witness Whereof, The Travelers Indemnity Company has caused these presents to be signed by its proper officer and its corporate seal to be hereunto affixed this 7th day of December, 1950.

The Travelers Indemnity Company,
By J. C. Smith,
(Seal) Secretary.

State of Connecticut, County of Hartford—ss:

On this 7th day of December, in the year 1950, before me personally came J. C. Smith, to me known, who, being by me duly sworn, did depose and say; that he resides in the State of Connecticut; that he is Secretary of The Travelers Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation, and that he signed his name thereto by like authority.

Grace G. Holland,
(Seal) Notary Public.
My commission expires April 1, 1954.

State of Connecticut, County of Hartford—ss:

I, R. W. Kamtsann, Assistant Secretary of The Travelers Indemnity Company, a corporation of the State of Connecticut, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney, executed by said Company, which is still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of Hartford, this 10th day of January, 1952.

R. W. Kamtsann,
Assistant Secretary.

NOTICE TO PLAINTIFF, ILLINOIS CENTRAL RAILROAD CO., ETC.

To the Honorable William T. Ingliss, Clerk of the United States District Court for the Western District of Kentucky:

You are hereby notified that the defendants, S. G. Olberding d/b/a Vess Transfer Co. and Charles Darnell, will on the 30th day of January, 1952, in the above cause, file with the Clerk of the United States District Court for the Western District of Kentucky, Paducah Division at Paducah, Kentucky, defendants' "Designation of Contents of Record on Appeal" and "Defendant-Appellants' Statement of Points" pursuant to Rule 75 of the Federal Rules of Civil Procedure.

A copy of said designation and statement of points is attached hereto.

Dated at Evansville, Indiana, this 24th day of January, 1952.

W. L. Mitchell,
W. C. Welborn,
Milford M. Miller,
Joseph S. Freeland,
Attorneys for Defendants.

PROOF OF SERVICE—Filed January 25, 1952.

Milford M. Miller, being first duly sworn upon his oath says that he is one of the attorneys of record representing the defendants, S. G. Olberding d/b/a Vess Transfer Co. and Charles Darnell. That on the 24th day of January, 1952, he deposited in the United States mail at the United States Post Office at Evansville, Indiana, an envelope with sufficient postage, addressed to Wheeler & Marshall, attorneys for the plaintiff, Paducah, Kentucky, the attached notice together with defendants' "Designation of Contents of

Proof of Service

Record on Appeal" and also "Defendant-Appellants' Statement of Points."

Further affiant sayeth not.

Milford M. Miller,

State of Indiana
Vanderburgh County } ss:

Subscribed and sworn to before me, a Notary Public in and for said County and State this 24th day of January, 1952.

My commission expires March 3, 1952.

Nadine Brady,
Notary Public.

(Seal)

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed January 25, 1952.

To the Honorable William T. Beckham, Clerk of the United States District Court for the Western District of Kentucky:

You are hereby requested to make a transcript of the record to be filed in the United States Court of Appeals for the Sixth Circuit, pursuant to Notice of Appeal in the above entitled cause and to include in such transcript of the record the following:

1. Plaintiff's Complaint and entry showing filing thereof.

2. Marshall's Return of Service on the Secretary of State for defendants Olberding and Darnell and entries showing filing thereof.

3. Return of Secretary of State showing mailing of process to Olberding and Darnell and filing thereof and entry showing filing thereof.

Designation of Contents of Record, Etc.

4. Motion of defendants S. G. Olberding and Charles Darnell to quash process and dismiss the action with supporting affidavit and entry showing the filing thereof.

5. Special appearance of Welborn and Miller for defendants Olberding and Darnell.

6. Plaintiff's Motion to Dismiss the Action as to defendant Brandeis Machinery and Supply Co., Inc. and entry showing the filing thereof.

7. Order sustaining the Motion to Dismiss the Action as to Brandeis Machinery and Supply Co., Inc. and dismissing the action as to said defendant.

8. Order overruling Motion of defendants S. G. Olberding and Charles Darnell to quash the process and dismiss the action as to said defendants.

9. Answer of defendants S. G. Olberding and Charles Darnell and entry showing the filing thereof.

10. Plaintiff's Motion to strike paragraphs two to eleven from first defense of Defendants' Answer and filing thereof.

11. Defendants' Motion for Leave to file Fourth Defense and defendants' Fourth Defense therewith.

12. Plaintiff's Objections to filing of defendants' Fourth Defense.

13. Defendant Charles Darnell's Motion to dismiss the action for non-joinder of indispensible party and for want of jurisdiction and entries showing filing thereof.

14. Order overruling plaintiff's objections to the filing of Fourth Defense and entry showing filing thereof.

15. Order of court sustaining plaintiff's Motion to Strike Paragraphs Two to Eleven from defendants' First Defense of Answer.

16. Order of court overruling Charles Darnell's Motion to Dismiss the Action.

17. Order setting case for trial.

18. Trial orders.

19. Filing of plaintiff's Amended Complaint to conform to the evidence and plaintiff's Amended Complaint.

20. Verdict of the jury.

21. Judgment of the Court.

Designation of Contents of Record, Etc.

22. Stipulation of the parties on the trial as to the citizenship of parties, plaintiff and defendants, as certified by the Reporter from the transcript of the evidence in the cause.

23. Notice of Appeal and date of filing Proof of Service thereof.

24. Appeal Bond.

25. This transcript of the contents of the record with Proof of Service.

26. Statement of Points relied upon by plaintiff.

27. Clerk's certificate authenticating the parts of the record designated herein.

Said transcript to be prepared as required by law and the rules of this court and of the United States Court of Appeals for the Sixth Circuit and to be transmitted to and filed in the office of the Clerk of the United States Court of Appeals for the Sixth Circuit on or before the 25th day of February, 1952.

Dated this 24th day of January, 1952.

W. L. Mitchell,
517 Citizens Bank Bldg.,
Evansville, Indiana,
W. C. Welborn,
Milford M. Miller,
502 Court Bldg.,
Evansville, Indiana,
Joseph S. Freeland,
Citizens Bank Bldg.,
Paducah, Kentucky,
Attorneys for Defendants.

DEFENDANT-APPELLANTS' STATEMENT OF POINTS—Filed January 25, 1952.

To the Honorable William T. Beckham, Clerk of the United States District Court for the Western District of Kentucky:

The defendants, S. G. Olberding and Charles Darnell, and each of them now serve with their "Designation of Contents of Record on Appeal" herein, the following concise statement of the points on which they and each of them intend to rely for a reversal thereof:

1. The court erred in overruling the Motion of the defendants, S. G. Olberding and Charles Darnell, to quash the process and dismiss the action with supporting affdavit.

2. The court erred in sustaining plaintiff's Motion to Dismiss the Action as to defendant Brandeis Machinery & Supply Co.

3. The court erred in sustaining plaintiff's Motion to Strike Paragraphs 2 to 11 from defendants' First Defense of the Answer herein.

4. The court erred in overruling defendant Charles Darnell's Motion to Dismiss the Action for Nonjoinder of Indispensible Party and for want of jurisdiction of the particular action herein.

5. The venue of the action was wrongfully laid as to the defendants, S. G. Olberding and Charles Darnell, because each is and was at the time of the filing of the action herein a citizen and resident of Indiana.

6. There is want of jurisdiction in the United States District Court for the Western District of Kentucky because the action is solely for personal judgment and neither plaintiff nor defendant nor any of them are citizens of Kentucky or reside in the Western District of Kentucky.

W. L. Mitchell,
W. C. Welborn,
Milford M. Miller,
Joseph S. Freeland.

COUNTER-DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS, AND EVIDENCE—Filed February 1, 1952.

To the Honorable W. T. Beckham, Clerk of the United States District Court, for the Western District of Kentucky:

For its counter-designation of additional portions of the record, proceedings, and evidence to be included in the record on appeal, the plaintiff, appellee, requests the inclusion of the following:

1. The deposition of the defendant, Charles Darnell, taken by the plaintiff, and read in evidence on plaintiff's behalf.

2. Transcript of the evidence of the witnesses:

S. W. Peters
Allen Ball
Loyce Thompson

This 1st day of February, 1952.

James G. Wheeler,
Thos. J. Marshall, Jr.,
Attorneys for Plaintiff.

PROOF OF SERVICE.

I certify that I have this day served copy of the above counter-designation of additional portions of the record, as follows:

1. On Joseph S. Freeland, Attorney for Defendants, by delivering copy to him.

2. On W. L. Mitchell, 517 Citizens Bank Building, Evansville, Indiana, Attorney for Defendants; W. C. Welborn, and Milford M. Miller, 502 Court Building, Evansville, Indiana by mailing copies to them at the addresses given above. This 1st day of February, 1952.

James G. Wheeler,
c/o Wheeler & Marshall,
901 Citizens Savings Bank Bldg.,
Paducah, Kentucky,
Attorneys for Plaintiff.

CLERK'S CERTIFICATE.

I, W. T. Beckham, Clerk, United States District Court for the Western District of Kentucky, certify that the foregoing is a true and correct copy of the record of proceedings had in this Court as called for by the Designation of Record filed January 25, 1952, and Counter-Designation filed February 1, 1952.

W. T. Beckham,
Clerk, United States District Court.

(Seal)

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CAUSE ARGUED AND SUBMITTED.

(February 2, 1953—Before: Allen, Martin and McAllister, *JJ.*)

This cause is argued by W. C. Welborn and William L. Mitchell for appellant and by James G. Wheeler for appellee and is submitted to the court.

JUDGMENT.

(Filed: February 12, 1953.)

Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Opinion

OPINION.

(Filed: February 12, 1953.)

No. 11587

UNITED STATES COURT OF APPEALS

For the Sixth Circuit.

S. G. Osborne, d.b.a. Vess Transfer Company, and Charles Darnell,

Appellants,

v.

Illinois Central Railroad Company,

Appellee.

} Appeal from the United States District Court for the Western District of Kentucky.

Decided February 12, 1953.

Before Allen, Martin and McAllister, Circuit Judges.

Martin, Circuit Judge. In the district court, a judgment was entered for plaintiff [now appellee] on the verdict of a jury awarding $37,500 damages for the negligent operation of a large motor vehicle which was transporting a piece of heavy machinery on a highway in McCracken County, Kentucky. The sole issue on appeal is a challenge to the venue of the United States District Court and the validity of the service of process on appellants.

Jurisdiction in the district court was grounded on the diversity of citizenship of the parties, the plaintiff railroad company having been incorporated under the laws of Illinois and appellants being residents of the State of Indiana. Service of process was rested upon Kentucky Revised Statutes 188.020 and 188.030, wherein it is provided: "Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to nonresidents to operate motor vehicles or have them operated within this state shall, by such acceptance and by the operation of such motor vehicle with-

in this state, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this state against the operator or owner arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved."

Upon the authority of the hereinafter cited cases, we think the action fell plainly within the venue of the United States District Court and that the service of process under the foregoing Kentucky statutes was valid.

In *Nierbo Co.* v. *Bethlehem Corporation*, 308 U. S. 165, 170, 174, the Supreme Court held that a foreign corporation which, in conformity with a valid state statute as a condition upon which it was privileged to do business within the state, designated an agent upon whom service of process could be made had given effective consent to being sued in the federal courts of that state. Compare *Ex Parte Schollenberger*, 96 U. S. 369. See also *Hess* v. *Pawloski*, 274 U. S. 352, wherein it was held that a Massachusetts statute was valid where it declared that the use of the state's highways by a nonresident motorist shall be deemed equivalent to an appointment by him of the registrar as his attorney upon whom process may be served in any action growing out of any accident or collision in which the nonresident may be involved while operating a motor vehicle on the state's highways. *Cf. Mississippi Publishing Corporation* v. *Murphree*, 326 U. S. 438.

A comprehensive opinion with which we are in accord is *Knott Corporation* v. *Parsons*, 163 F. (2d) 199, 204 (C. A. 4). In that case, Judge Parker states: "It is well settled that appointment of an agent upon whom service of process can be made within a state waives the provision of the federal venue statute, so that a defendant may be sued in the state in the federal court as well as in the state court, if the case is within the federal jurisdiction. [Citing the *Nierbo* and *Schollenberger* cases.] . . . Applying to the case at bar the 'common sense' which Chief Justice Waite is said by the Supreme Court to have applied in the *Schollenberger* case, we think it clear that with respect to waiving the provisions of the federal

venue statute there can be no distinction between the consent to suit and service of process implied from doing business in the state and that arising out of appointment of a process agent, so that where a foreign corporation has given such consent as subjects it to suit in the courts of the state, the same consent subjects it to suit in the federal courts there sitting if the elements of federal jurisdiction are present. Or to put the matter conversely, the consent implied from doing business in the state not only authorizes suit in the courts of the state, with service of process upon a designated state officer, but also waives the provisions of the federal venue statute so that suit can be brought in the federal court, if the elements of federal jurisdiction are present."

A well reasoned district court opinion, written by Judge Vaught, is directly in point in sustaining venue and service in this case. *Burnett* v. *Swenson*, 95 F. Supp. 524 (W. D. Okla.). See also *Kostamo* v. *Brorby*, 96 F. Supp. 806 (D. C. Neb.); *Morris* v. *Sun Oil Company*, 83 F. Supp. 529 (D. C. Md.), opinion by Judge Chesnut; *Urso* v. *Scales*, 90 F. Supp. 653 (D. C. Pa.). We are not in accord with the opinion in *Martin* v. *Fischbach Trucking Co.*, 183 F. (2d) 53 (C. A. 1).

The judgment of the district court is affirmed.

MOTION BY PLAINTIFFS-APPELLANTS FOR STAY OF MANDATE.

(Filed February 16, 1953.)

Come now the plaintiffs-appellants, S. G. Olberding and Charles Darnell, and respectfully move the court for a stay of mandate in the above entitled cause, decided February 12, 1953, for the purpose of giving said plaintiffs-appellants time to prepare and file a petition for writ of certiorari in the Supreme Court of the United States.

Plaintiffs-Appellants respectfully represent to the court that in their opinion the decision and judgment of the court so made and entered on the 12th day of February, 1953, is erroneous and in conflict with the decision of the United States Court of Appeals for the First Circuit in the case of *Martin vs. Fischbach Trucking Co.* (1950), 183 F. (2d) 53, on the same matter and decides an important question of local law probably in conflict with the applicable local decisions of the Court of Last Resort in the State of Kentucky on the same matter and decides an important question of Federal law which has not been, but should be, settled by the Supreme Court of the United States, namely the question of involuntary waiver of the venue provisions of Section 1391(a) of the Judicial Code by the operation by a nonresident of a motor vehicle in the State of Kentucky and has decided this Federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States.

Plaintiffs-Appellants further represent to the court that they will proceed with due diligence and prompt dispatch and will cause to be prepared a sufficient transcript of the proceedings had in the above entitled cause necessary for use in connection with their said petition for certiorari, and will cause the same to be properly filed in the office of the Clerk of the Supreme Court of the United States within the time fixed and allowed by the Rules of said court, or within such extension of time as may be granted by said court or some Justice thereof.

WHEREFORE, plaintiffs-appellants move the court for an order staying the issuance of the mandate on the judgment thus rendered by this court on the 12th day of February, 1953, for a period of thirty days pending the ap-

plication for certiorari to the Supreme Court of the United States, as aforesaid, and for such further relief in the premises as may be considered appropriate by the court.

Dated this 17th day of February, 1953.

Respectfully submitted:

S. G. Olberding,
Charles Darnell,
By W. L. Mitchell,
W. C. Weldon,
Milwood M. Miller.

PRAECIPE FOR TRANSCRIPT FOR USE IN APPLICATION FOR WRIT OF CERTIORARI.

(Filed February 18, 1953.)

To the Clerk of the United States Court of Appeals for the Sixth Circuit at Cincinnati:

You will please prepare for S. G. Olberding and Charles Darnell, Petitioners-Appellants, a complete transcript of the record in the above entitled cause for use in connection with their Petition for Writ of Certiorari in the Supreme Court of the United States, and include therein the following:

1. Certified Transcript of the Record of the proceedings had in the United States District Court for the Western District of Kentucky, Paducah Division, printed copy of which was filed in your office on the 24th day of April, 1952.

2. The proceedings had in the United States Court of Appeals for the Sixth Circuit in said action including the opinion of the Court of Appeals of February 12, 1953, and the judgment of the Court of Appeals of February 12, 1953.

3. Reference to the filing of petitioners' written Motion to Stay the Mandate of the United States Court of Appeals for the Sixth Circuit and Order entered thereon and date thereof.

4. Copy of the Praecipe.

5. Proper Clerk's Certificate.

Dated this 17th day of February, 1953.

S. G. Glenbrook,
Charles Darnell,
Plaintiffs-Appellants,

By W. L. Mitchell,
W. C. Wheeler,
Milford M. Miller,
Attorneys for Plaintiffs-Appellants.

PROOF OF SERVICE OF PRAECIPE FOR TRANSCRIPT FOR USE IN APPLICATION FOR WRIT OF CERTIORARI ON RESPONDENT-APPELLEE.

(Filed February 18, 1953.)

Milford M. Miller, being first duly sworn upon his oath says, that he is one of the attorneys for record representing the Petitioners-Appellants. That on the 17th day of February, 1953, he deposited in the United States mail, at the Post Office at Evansville, Indiana, in envelope with sufficient postage, addressed to the following attorneys for the Respondent-Appellee, a copy of praecipe for transcript for use in application for writ of certiorari, as hereto attached: Wheeler & Marshall, 901-5 Citizens Bank Building, Paducah, Kentucky.

Further affiant sayeth not.

Milford M. Miller.

State of Indiana,
Vanderburgh County, ss.

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 17th day of February, 1953.

Benjamin E. Burnte,
Notary Public.

Commission expires: August 21, 1955.

(Seal)

ORDER STAYING MANDATE.

(Filed February 26, 1953.)

Ordered, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

APPROVED FOR ENTRY:

JOHN D. MARTIN,
U. S. Circuit Judge.

Certificate of Clerk

UNITED STATES COURT OF APPEALS

For the Sixth Circuit.

I, Carl W. Reuss, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of S. G. Olberding, etc., et al. vs. Illinois Central Railroad Co., Inc., No. 11,587, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 26th day of February, A. D. 1953.

Carl W. Reuss, *Clerk*,
Noyce Robertson,
Chief Deputy Clerk of the United States Court of Appeals for the Sixth Circuit.

(Seal)

Supreme Court of the United States, October Term, 1953

No. 683

S. G. Olberding, Doing Business as Vess Transfer Company and Charles Darnell, Petitioners,

vs.

Illinois Central Railroad Company, Inc.

Order Allowing Certiorari—Filed May 4, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. . . . . .

S. G. OLBERDING, doing business as VESS TRANSFER COMPANY and CHARLES DARNELL,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Your petitioners, S. G. Olberding and Charles Darnell, hereinafter designated as Appellants, respectfully pray that a writ of certiorari issue to review and reverse the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on the 12th day of February, 1953, and represent as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The action herein is one for personal judgment for property damage filed by Illinois Central Railroad Company, Inc. as plaintiff against S. G. Olberding, d/b/a Vess Transfer Company and Charles Darnell, defendants, in the United States District Court for the Western District of Kentucky, Paducah Division, on the 10th day of May, 1951. The Appellee, Illinois Central Railroad Company,

Inc., is a citizen of the State of Illinois and the complaint alleges is a "nonresident" of the State of Kentucky. The Appellants, S. G. Olberding and Charles Darnell, are and were at all times involved in the action, citizens of Indiana and residing at Evansville, Indiana. (R. 1-2 and R. 2-3, 45.)

2. The basis for jurisdiction in the United States District Court for the Western District of Kentucky, Paducah Division, is the diversity of citizenship of parties plaintiff and defendant and the controversy, exclusive of interest and costs, involving more than $3,000.00. (R. 1-2.)

3. The action arises from the alleged negligence of defendant Darnell in operating a motor vehicle of defendant Olberding on County Highway 305 in McCracken County, Kentucky, in such manner as to cause the same to run into and strike the bridge or overhead trestle of the plaintiff railroad company knocking the bridge and railroad tracks out of line and causing the derailment of a freight train operated by plaintiff railroad company consisting of a locomotive and 95 cars, to the damage of the plaintiff in the sum and amount of $150,000.00. Defendant Olberding is sued as the owner of the tractor and flat bed trailer upon which was loaded a dozer shovel and the defendant Darnell as the operator of said equipment when the accident occurred on the 26th day of April, 1951. Complaint was filed in the United States District Court for the Western District of Kentucky, Paducah Division, on May 10, 1951, and summons was issued for the defendants Olberding and Darnell, directed to the United States Marshal for the Eastern District of Kentucky and served on the Secretary of State at Frankfort, Kentucky, "pursuant to Chapter 188, Kentucky Revised Statutes, Sections .020 and .030." (R. 3.)

4. On May 29, 1951, under special and limited appearance the defendants Olberding and Darnell moved the Court for an order that the process and the service thereof be set aside and quashed and the action dismissed as to the individual defendants for the reason that each was a resident of the city of Evansville, State of Indiana, and at all times has been such resident and setting up that each of the defendants insists on his right to be sued in the district court of his residence and demands application of the laws of the United States in respect to venue in this proceeding and that the plaintiff is a nonresident of the State of Kentucky and is an inhabitant and resident of the State of Illinois and the Court is without jurisdiction to proceed in the action over the objection of these defendants because neither plaintiff nor defendant are citizens or residents of Kentucky or the Western District thereof. (R. 3-4.) Said motion was verified and discloses that the service of process upon the Secretary of State was beyond the Western District of Kentucky, Paducah Division, and without the purview of the Federal Statutes or the Federal Rules of Civil Procedure governing process. (R. 4-6.) Supporting affidavits disclose that neither of the individual defendants reside in the State of Kentucky or in the Western District thereof and they were served by registered mail only and the moving affiant Olberding prays the dismissal of the action as to himself and co-defendant and that the process and the service thereof be set aside and quashed. (R. 7-8.) On July 17, 1951, the plaintiff, Illinois Central Railroad Company, Inc., moved the Court for an order to dismiss the action as to the corporation defendant, the Brandeis Machinery and Supply Company, Inc., which motion the Court on said date sustained. (R. 9.) On the 15th day of August, 1951, the Court overruled the motion of the defendants Olberding and Darnell to set aside the

service of process and quash the writ and dismiss the action as to said defendants. (R. 10.) The action of the Court in overruling the motion is Point 1 of defendants' Statement of Points on which they relied for reversal in the United States Court of Appeals. (R. 56.)

5. On August 29, 1951, under their special and limited appearance herein, defendants filed their First Defense to the plaintiff's Complaint setting out that neither plaintiff nor the defendants-appellants are or were at any time citizens or residents of the State of Kentucky; that the action is founded on diversity of citizenship and may be brought only in the judicial district where all the defendants or all the plaintiffs are residents and claiming the privilege to be sued only in the United States District Court for the Southern District of Indiana, Evansville Division, and denying that they may be sued where found actually or constructively in the United States District Court for the Western District of Kentucky, Paducah Division, and refusing to waive their venue rights pray the Court for an order to dismiss the action as to each of them and quash the notice on the Secretary of State of the State of Kentucky as to these individual defendants-appellants and each of them. On September 15, 1951, the Court sustained the motion of the plaintiff-appellee to strike out the allegations of the First Defense on the grounds that the same were a reiteration of the defendants' motion to dismiss the action and quash the process and this ruling of the Court in striking out Paragraphs 2 to 11 from defendants' First Defense of the Answer is Point No. 3 of Defendants-Appellants' Statement of Points on which they rely for reversal in the United States Court of Appeals. (R. 56.)

6. On October 11, 1951, the defendant, Charles Darnell, moved the Court for an order to dismiss the action

herein because, among other grounds, that neither plaintiff nor defendants resided in the jurisdiction of the United States District Court for the Western District of Kentucky and setting up that Chapter 188, Kentucky Revised Statutes, entitled "Nonresident Motorist, Service of Process On," is a process and not a venue statute and neither purports to nor does affect the venue of the action and claiming the protection of the Federal venue statute and setting up that defendants in no manner can be deprived of their federal right to be sued in the district of their residence by a purely process statute of the State of Kentucky. On October 18, 1951, the Court overruled said motion of Charles Darnell (R. 16-19), and this action of the Court in overruling defendant Charles Darnell's motion to dismiss the action is Point No. 4 relied on for reversal in the United States Court of Appeals. (R. 56.)

7. Defendants-appellants filed their Second Defense alleging that the Complaint fails to state a claim against the defendants or either of them upon which relief can be granted (R. 13), and defendants' Third Defense is a denial of the allegations of the Complaint. (R. 13.) Defendants filed their Fourth Defense that the damage complained of in plaintiff's Complaint, if any, was owing to and resulted from the negligence of the plaintiff, Illinois Central Railroad Company, Inc., its agents and employees. (R. 15.)

8. Trial was by jury at the city of Paducah in the Western District of Kentucky on December 17, 18 and 19 and resulted in the verdict for damages in the sum of $37,500.00 and judgment followed for the plaintiff-appellee, Illinois Central Railroad Company, Inc., and against the defendants-appellants, S. G. Olberding and Charles Darnell in the said sum of $37,500.00. (R. 47.)

9. At the conclusion of the introduction of plaintiff's testimony the parties stipulated as evidence in the cause,

that the Illinois Central Railroad Company, Inc., plaintiff, is and was at the time of the filing of the action and at all times since, a citizen of the State of Illinois and the individual defendants, S. G. Olberding and Charles Darnell, were at the time of the filing of the action and at all times since and now are each citizens of the State of Indiana and residing in the city of Evansville, Indiana. (R. 45, 46.)

10. Excerpts of testimony are in the record. (R. 23-44.) Plaintiff introduced the deposition of the defendant Charles Darnell. (R. 23.) The witness has lived in Evansville, Indiana, since he was six years old and is now 54, is employed by the Vess Transfer Company owned by S. G. Olberding (R. 25) as a truck-driver; was in McCracken County, Kentucky, on April 26, 1951. He had a caterpillar tractor on his truck loaded at Louisville, Kentucky, the same day. (R. 25.) He was driving a Chevrolet trailer loaded at the Brandeis Machinery and Supply Company, Inc. (R. 28, 29.) The overpass was 11 feet, 4 inches and his load was about 1½ inches higher than that. The machine was a Bucyrus Dozer Shovel. (R. 32-33.)

The witness Loyce Thompson called by plaintiff, testified he heard the truck strike the trestle or overpass and saw the driver back out from the trestle. (R. 35.)

S. W. Peters, a witness called by the plaintiff, testified that he is employed by the Brandeis Machinery and Supply Company, Inc., as office engineer and negotiated the contract with Mr. Olberding to transfer the crawler tractor from Louisville to Paducah, consigned to the Smiley Sand and Gravel Company (R. 39-40) and the contract was for the entire job.

Mr. Allen Ball, called as witness for the plaintiff, testified that he lives in Paducah and was employed by Brandeis Machinery and Supply Company, Inc., as manager of the local branch at Paducah. (R. 41.) He directed

the shipment to be made to the Smiley job from Louisville and on April 26, 1951, he directed Mr. Darnell how to reach the job where Mr. Smiley was working at the plant and Mr. Darnell brought the equipment back to the Paducah yard of the Brandeis Machinery and Supply Company, Inc. and left it there. (R. 42-43.) The only break that he noticed on the equipment was the part that held the upright digging apparatus and this appeared to be minor at the time. (R. 44.)

The trial order of the Court is as follows:

"TRIAL ORDER—Entered December 19, 1951.

On December 17, 1951, came the parties by counsel and announced ready for trial. Plaintiff was represented by Messrs. Wheeler and Marshall, Paducah; defendants by Messrs. W. C. Welborn and W. L. Mitchell, Evansville, Indiana, and Joseph S. Freeland, Paducah. A jury was selected, impaneled, and sworn.

Mr. Marshall stated the case for the plaintiff, Mr. Mitchell for the defendants.

Plaintiff began presentation of its evidence and continued through the day. At five o'clock court adjourned to December 18th, at 9:30.

On December 18th, plaintiff's presentation of evidence was resumed and continued through the day.

On December 19th, trial was resumed. Plaintiff offered to file an amended complaint to conform to the proof, to which objection by defendants was made. Defendants' objection was overruled and the amended answer ordered filed. Same was controverted of record.

It was stipulated by counsel that plaintiff is a citizen of Illinois and defendants at the time of the accident sued on were and are now residents of Indiana, residing at Evansville, Indiana.

Defendants' evidence was then presented and was completed at 2:25 p.m. No rebuttal was presented,

and court recessed for conference on instructions until 3:20. Argument of counsel was made to the jury, the Court's instructions were given, and the jury retired at 4:50 p.m.

Objections made by the parties to the court's instructions, more particularly shown by the reporter's transcript of the evidence herein, were overruled by the Court.

At approximately 7:00 p.m. the jury returned to court and read and filed with the Clerk the following verdict:

'We, the jury, find for the Plaintiff damages in the sum of $37,500.00.' J. D. Rains, Foreman.

ROY M. SHELBOURNE,
Judge, U. S. District Court."

(R. 46-47.)

The judgment of the Court entered December 19, 1951, is as follows:

"JUDGMENT—Entered December 19, 1951.

The jury herein having returned a verdict for the plaintiff, Illinois Central Railroad Company, Inc., against the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell,

It Is Ordered, Adjudged, and Decreed that the plaintiff, Illinois Central Railroad Company, Inc., have and recover of the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell, the sum of Thirty-Seven Thousand Five Hundred ($37,500.00) Dollars with interest thereon at the rate of 6% per annum from date hereof until paid, and its costs herein, for all of which execution may issue.

ROY M. SHELBOURNE,
Judge, U. S. District Court."

(R. 47.)

The Notice of Appeal was filed and served on plaintiff-appellee January 16, 1952. (R. 48.)

Defendants-Appellants' Statement of Points Relied on for Reversal was filed with the Clerk January 25, 1952, and is as follows:

"DEFENDANTS-APPELLANTS' STATEMENT OF POINTS—Filed January 25, 1952.

To the Honorable William T. Beckham, Clerk of the United States District Court for the Western District of Kentucky:

The defendants, S. G. Olberding and Charles Darnell, and each of them now serve with their 'Designation of Contents of Record on Appeal' herein, the following concise statement of the points on which they and each of them intend to rely for a reversal thereof:

1. The court erred in overruling the Motion of the defendants, S. G. Olberding and Charles Darnell, to quash the process and dismiss the action with supporting affidavit.

2. The court erred in sustaining plaintiff's Motion to Dismiss the Action as to defendant Brandeis Machinery & Supply Co.

3. The court erred in sustaining plaintiff's Motion to Strike Paragraphs 2 to 11 from defendants' First Defense of the Answer herein.

4. The court erred in overruling defendant Charles Darnell's Motion to Dismiss the Action for Nonjoinder of Indispensable Party and for want of jurisdiction of the particular action herein.

5. The venue of the action was wrongfully laid as to the defendants, S. G. Olberding and Charles Darnell, because each is and was at the time of the filing of the action herein a citizen and resident of Indiana.

6. There is want of jurisdiction in the United States District Court for the Western District of Ken-

tucky because the action is solely for personal judgment and neither plaintiff nor defendant nor any of them are citizens of Kentucky or reside in the Western District of Kentucky.

W. L. Mitchell,
W. C. Weldorn,
Milford M. Miller,
Joseph S. Freeland."

(R. 56.)

II.

OPINIONS BELOW.

There was no written opinion of the District Court. Verdict of the jury and judgment of the Court are at pages 46 and 47 of the Record.

The opinion of the United States Court of Appeals for the Sixth Circuit is not quoted but is found in the Record at pages 60 to 62 thereof.

III.

BASIS OF THIS COURT'S JURISDICTION.

The judgment of the Court of Appeals was entered on February 12, 1953. (R. 59.) No Petition for Rehearing was filed.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

This petition is presented in a civil case by the defendants-appellants who were and are parties thereto.

IV.

STATUTES INVOLVED.

The pertinent statutory provisions of Title 28, United States Code, Section 1254 (1) are:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The venue rights claimed by the defendants-appellants arise under Title 28, U. S. C. A., Section 1391 (a):

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

Title 28, U. S. C. A., Section 1392 (a):

> "(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

Title 28, U. S. C. A., Section 1393 (a):

> "(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides."

Section 74 of the Civil Code of Practice of Kentucky provides:

> "An action for an injury to the person or property of plaintiff must be brought in the county in which the defendant resides or in which the injury is done."

The provisions of the Kentucky Revised Statutes, Chapter 188 Sections .020 and .030 are invoked by plaintiff-appellee and are as follows:

"Nonresident Owner or Operator of Motor Vehicle Makes Secretary of State Process Agent.—Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to nonresidents to operate motor vehicles or have them operated within this state shall, by such acceptance and by the operation of such motor vehicle within this state, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this state against the operator or owner arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved.

Service of Summons and Petition in Action Against Nonresident Motorist.—The clerk of the court in which the action is brought shall issue it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering a true copy to the Secretary of State at least twenty days before the return day of the summons, and shall also deliver with the summons an attested copy of plaintiff's petition. The Secretary of State shall then write a letter to the defendant, at the address given in the petition, notifying him of the nature and pendency of the action, and enclosing in the letter the summons and the copy of the petition. The letter shall be posted by prepaid registered mail and shall bear the return address of the Secretary. The Secretary shall file a report of his action, which shall include a copy of the letter, any answer thereto, and the return registry receipt, with the clerk who issued the summons."

V.

QUESTIONS PRESENTED.

Question 1.

Does the Kentucky Nonresident Motorist Act, Kentucky Revised Statutes, Chapter 188.010-.060, construed by the Court of Last Resort of Kentucky to be a purely process statute and held not to affect the venue of civil actions in the Kentucky Courts, affect the venue of like actions in the United States District Courts?

Question 2.

Will the Kentucky Nonresident Motorist Act, which leaves the defendant free to object to the venue of any state court excepting only the one forum where the injury is done be construed to deny the defendant the right to assert his venue privileges under the Judicial Code of the United States, Title 28, Section 1391(a), in the United States District Court?

Question 3.

Will the nonresident motorist be denied his venue rights in the United States District Court under the Nonresident Motorist Act when the law of the state preserves his venue rights in the courts of the state under the same act?

Question 4.

May a defendant in this action for personal judgment be brought into court by constructive service of process when personal service, though had, would be unavailing?

Question 5.

Does the United States District Court obtain jurisdiction over the persons of the defendants by service of process upon the Secretary of State when personal service upon the defendants in or out of the district would be ineffective over defendants' objection?

VI.

REASONS RELIED ON FOR THE WRIT.

1. The decision of the United States Court of Appeals for the Sixth Circuit is in conflict with the decision of the United States Court of Appeals for the First Circuit in the case of *Martin vs. Fischback Trucking Co.*, 183 F. (2d) 53 (CA 1) in holding that the enforced designation of the Secretary of State as process agent in any civil action instituted in the courts of the state enables the United States District Court for the Western District of Kentucky to issue process to the Secretary of State in the Eastern District of Kentucky effective to acquire jurisdiction over the person of the defendants and of the particular action and is and constitutes a waiver of the venue privilege of the individual defendants as provided by the Judicial Code of the United States, Title 28, Section 1391(a), 1392(a) and 1393(a).

2. The decision of the United States Court of Appeals for the Sixth Circuit as to the effect of the Kentucky Nonresident Motorist Act, Kentucky Revised Statutes, 188.020 and 188.030 on venue of the action arising thereunder in holding that appointing the Secretary of State their process agent waives the right of the individual defendants to object to venue is a decision on an important question of local law in a way in conflict with applicable local decisions on the same subject as follows:

Kennedy vs. Lee (1938), 272 Ky. 237, 13 S. W. (2d) 1125. *Fisher Packing Co. vs. Mattox* (1936), 262 Ky. 318, 90 S. W. (2d) 17, holding that the Kentucky Act is a purely process statute and does not affect venue.

3. The decision of the United States Court of Appeals for the Sixth Circuit involves an important question of federal law which is not decided but should be settled by the Supreme Court of the United States:—Does a natural person by operating a motor vehicle within the state and thereby consenting to service of process upon the Secretary of State in the event of damage resulting from such operation waive his right to be sued only in the United States District Court of the District of his physical habitation?

4. The decision of the United States Court of Appeals for the Sixth Circuit involves an important question of Federal law which is not decided but should be settled by the Supreme Court of the United States as follows:—Does the involuntary appointment of the Secretary of State as process agent in a civil action for damages under the Non-resident Motorist Act have the same effect as a waiver of venue in the United States District Court in the case of a corporation defendant carrying on its business within a state, complying with the state law by naming a process agent and becoming a resident of the state under the provisions of the Judicial Code, Title 28, Section 1391 (c)?

5. The decision of the United States Court of Appeals for the Sixth Circuit involves an important question of federal law which is not decided but should be settled by the Supreme Court of the United States as follows:—Is constructive service of process issued by the Clerk of the United States District Court for the Western District of Kentucky to the United States Marshal for the Eastern

District of Kentucky to be served upon the Secretary of State in the Eastern District of Kentucky effective to acquire jurisdiction over the persons of the individual defendants residing in the Southern District of Indiana and of the particular action against the defendants when personal service of process upon the individual defendants would not be effective to implement the jurisdiction of the district court.

6. The decision of the United States Court of Appeals for the Sixth Circuit in holding constructive service of process upon the Secretary of State is valid over the objections of the individual defendants when personal service of process issued by the same United States District Court would be set aside upon motion of the defendant, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

7. The decision of the United States Court of Appeals for the Sixth Circuit that the United States District Court for the Western District of Kentucky obtained jurisdiction over the persons of the individual defendants by service of process upon the Secretary of State when personal service of process issued by the United States District Court for the Western District of Kentucky and served upon defendants in or out of the district would be ineffective over defendants' objection so far sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the Seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full

and complete transcript of the record and of the proceedings of the said United States Court of Appeals had in the case numbered and entitled on its docket, No. 11,587, S. G. Olberding, d/b/a Veas Transfer Co. and Charles Darnell, Plaintiffs-Appellants vs. Illinois Central Railroad Company, Inc., Defendant-Appellee, all to the end that this cause may be reviewed and determined by the Court as provided for by the Statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Sixth Circuit be reversed by the Court and for such further relief as to this Court may seem proper.

Dated March 28, 1953.

S. G. OLBERDING,
CHARLES DARNELL,
Petitioners,

By W. C. WELBORN,
MILFORD M. MILLER,
Counsel for Petitioners.

W. L. MITCHELL,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. 27.

S. G. OLBERDING,
doing business as
VESS TRANSFER COMPANY and
CHARLES DARNELL,
Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONERS' BRIEF.

OPINIONS BELOW.

There was no written opinion of the District Court. The verdict of the jury and judgment of the court are at pages 46 and 47 of the record. The opinion of the United States Court of Appeals for the Sixth Circuit affirming the District Court was handed down February 12, 1953, and is reported in 201 F. (2d) 582, and appears in the record at page 60.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254, providing:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Certiorari to the United States Court of Appeals for the Sixth Circuit was granted herein on petition filed March 28, 1953, and granted May 4, 1953. (R. 67.)

STATEMENT OF THE CASE.

1. The action is for purported damage caused by the alleged negligence of defendant, Charles Darnell, in operating a motor vehicle of the defendant Olberding on County Highway 305 in McCracken County, Kentucky. Defendant Olberding is sued as the owner of the tractor and flat bed trailer on which was loaded a dozer shovel, and the defendant Darnell as the operator of said equipment when the accident occurred on the 26th day of April, 1951. (R. 1-2, R. 2-3; R. 45.)

2. The respondent, Illinois Central Railroad Company, Inc., is a citizen and resident of the State of Illinois and the petitioners S. G. Olberding and Charles Darnell are and were at all times involved in the action, citizens of Indiana and residing at Evansville, Indiana, in the Southern District of Indiana. (R. 45.)

3. The ground of jurisdiction in the United States District Court for the Western District of Kentucky, Paducah Division, is the diversity of citizenship of parties plaintiff and defendant and that the matter in controversy, exclusive of interests and costs, exceeds the sum of $3000.00. (R. 1-2.)

4. Complaint was filed in the United States District Court for the Western District of Kentucky, Paducah Division, May 10, 1951, and summons was issued for the de-

fendants, Olberding and Darnell, directed to the United States Marshal for the Eastern District of Kentucky and served on the Secretary of State at Frankfort, Kentucky, "pursuant to Chapter 188, Kentucky Revised Statutes, Sections .020-.030." (R. 3.)

5. On May 29, 1951, under special and limited appearance, the defendants Olberding and Darnell moved the Court for an order that the process and the service thereof be set aside and quashed and the action dismissed as to the individual defendants for the reason that each was a resident of the city of Evansville, State of Indiana, and at all times has been such resident, and setting up that each of the defendants insists on his right to be sued in the district court of his residence and demands application of the laws of the United States in respect to venue in this proceeding, and that the plaintiff is a non-resident of the State of Kentucky and is an inhabitant and resident of the State of Illinois, and the Court is without jurisdiction to proceed in the action over the objection of these defendants, because neither plaintiff nor defendant are citizens or residents of Kentucky or the Western District thereof. (R. 3-4.) Said motion was verified and discloses that the service of process upon the Secretary of State was beyond the Western District of Kentucky, Paducah Division, and without the purview of the Federal Statutes or the Federal Rules of Civil Procedure governing process. (R. 4-6.) Supporting affidavits disclose that neither of the individual defendants reside in the State of Kentucky or in the Western District thereof and they were served by registered mail only, and the moving affiant Olberding prays the dismissal of the action as to himself and co-defendant and that the process and the service thereof be set aside and quashed. (R. 7-8.) On July 17, 1951, the

plaintiff, Illinois Central Railroad Company, Inc., moved the Court for an order to dismiss the action as to the corporation defendant, the Brandeis Machinery and Supply Company, Inc., which motion the Court on said date sustained. (R. 9.) On the 15th day of August, 1951, the Court overruled the motion of the defendants Olberding and Darnell to set aside the service of process and quash the writ and dismiss the action as to said defendants. (R. 10.) The action of the Court in overruling the motion is Point 1 of defendants' Statement of Points on which they relied for reversal in the United States Court of Appeals. (R. 56.)

6. On August 29, 1951, under their special and limited appearance herein, defendants filed their First Defense to the plaintiff's Complaint setting out that neither plaintiff nor the defendants-appellants are or were at any time citizens or residents of the State of Kentucky; that the action is founded on diversity of citizenship and may be brought only in the judicial district where all the defendants or all the plaintiffs are residents; and claiming the privilege to be sued only in the United States District Court for the Southern District of Indiana, Evansville Division, and denying that they may be sued where found actually or constructively in the United States District Court for the Western District of Kentucky, Paducah Division, and refusing to waive their venue rights pray the Court for an order to dismiss the action as to each of them and quash the notice on the Secretary of State of the State of Kentucky as to these individual defendants-appellants and each of them. On September 15, 1951, the Court sustained the motion of the plaintiff-appellee to strike out the allegations of the First Defense on the grounds that the same were a reiteration of the defendants' motion to

dismiss the action and quash the process and this ruling of the Court in striking out Paragraphs 2 to 11 from defendants' First Defense of the Answer is Point No. 3 of Defendants-Appellants' Statement of Points on which they rely for reversal in the United States Court of Appeals. (R. 56.)

7. On October 11, 1951, the defendant, Charles Darnell, moved the Court for an order to dismiss the action herein because, among other grounds, that neither plaintiff nor defendants resided in the jurisdiction of the United States District Court for the Western District of Kentucky and setting up that Chapter 188, Kentucky Revised Statutes, entitled "Nonresident Motorist, Service of Process On," is a process and not a venue statute and neither purports to nor does affect the venue of the action, and claiming the protection of the Federal venue statute and setting up that defendants in no manner can be deprived of their federal right to be sued in the district of their residence by a purely process statute of the State of Kentucky. On October 18, 1951, the Court overruled said motion of Charles Darnell (R. 16-19), and this action of the Court in overruling defendant Charles Darnell's motion to dismiss the action is Point No. 4 relied on for reversal in the United States Court of Appeals. (R. 56.)

8. Defendants-appellants filed their Second Defense alleging that the Complaint fails to state a claim against the defendants or either of them upon which relief can be granted (R. 13), and defendants' Third Defense is a denial of the allegations of the Complaint. (R. 13.) Defendants filed their Fourth Defense that the damage complained of in plaintiff's Complaint, if any, was owing to and resulted from the negligence of the plaintiff, Illinois Central Railroad Company, Inc., its agents and employees. (R. 15.)

9. Trial was by jury at the city of Paducah in the Western District of Kentucky on December 17, 18 and 19 and resulted in the verdict for damages in the sum of $37,500.00 and judgment followed for the plaintiff-appellee, Illinois Central Railroad Company, Inc., and against the defendants-appellants, S. G. Olberding and Charles Darnell in the said sum of $37,500.00. (R. 47.)

10. It is alleged in respondent's Complaint that the Illinois Central Railroad Company, Inc., is a citizen of the State of Illinois and a nonresident of the State of Kentucky, and that the appellants, S. G. Olberding and Charles Darnell, are and were at all times involved in the action, citizens of Indiana and residing at Evansville, Indiana. (R. 1-2.) At the conclusion of the introduction of plaintiff's testimony on the trial, the parties stipulated as evidence in the cause that the Illinois Central Railroad Company, Inc., plaintiff, is and was at the time of the filing of the action and at all times since, a citizen of the State of Illinois and the individual defendants, S. G. Olberding and Charles Darnell, and each of them were at the time of the filing of the action and at all times since and now are citizens of the State of Indiana and residing in the City of Evansville, Indiana. (R. 45, 46.)

11. Excerpts of testimony are in the record. (R. 23-44.) Plaintiff introduced the deposition of the defendant Charles Darnell. (R. 23.) The witness has lived in Evansville, Indiana, since he was six years old and is now 54, is employed by the Vess Transfer Company owned by S. G. Olberding (R. 25) as a truck driver; was in McCracken County, Kentucky, on April 26, 1951. He had a caterpillar tractor on his truck loaded at Louisville, Kentucky, the same day. (R. 25.) He was driving a Chevrolet trailer loaded at the Brandeis Machinery and Supply Company, Inc. (R. 28, 29.) The overpass was 11 feet, 4 inches and

his load was about 1½ inches higher than that. The machine was a Bucyrus Dozer Shovel. (R. 32-33.)

The witness Loyce Thompson, called by plaintiff, testified he heard the truck strike the trestle or overpass and saw the driver back out from the trestle. (R. 35.)

S. W. Peters, a witness called by the plaintiff, testified that he is employed by the Brandeis Machinery and Supply Company, Inc., as office engineer and negotiated the contract with Mr. Olberding to transfer the crawler tractor from Louisville to Paducah consigned to the Smiley Sand and Gravel Company (R. 39-40) and the contract was for the entire job.

Mr. Allen Ball, called as witness for the plaintiff, testified that he lives in Paducah and was employed by Brandeis Machinery and Supply Company, Inc., as manager of the local branch at Paducah. (R. 41.) He directed the shipment to be made to the Smiley job from Louisville and on April 26, 1951, he directed Mr. Darnell how to reach the job where Mr. Smiley was working at the plant and Mr. Darnell brought the equipment back to the Paducah yard of the Brandeis Machinery and Supply Company, Inc. and left it there. (R. 42-53.) The only break that he noticed on the equipment was the part that held the upright digging apparatus and this appeared to be minor at the time. (R. 44.)

12. The judgment of the United States District Court for the Western District of Kentucky entered December 19, 1951, is as follows (R. 47):

> "The jury herein having returned a verdict for the plaintiff, Illinois Central Railroad Company, Inc., against the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell,
>
> "It is Ordered, Adjudged, and Decreed that the plaintiff, Illinois Central Railroad Company, Inc.,

have and recover of the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell, the sum of Thirty-Seven Thousand Five Hundred ($37,500.00) Dollars with interest thereon at the rate of 6% per annum from date hereof until paid, and its costs herein, for all of which execution may issue.

ROY M. SHELBOURNE,
Judge, U. S. District Court."

13. Notice of appeal was filed and served on plaintiff-appellee January 16, 1953. (R. 48.)

14. Defendants-Appellants' Statement of Points Relied on for Reversal was filed with the Clerk of the United States District Court for the Western District of Kentucky January 25, 1952, and is as follows: (R. 56):

"DEFENDANTS-APPELLANTS' STATEMENT OF POINTS—
Filed January 25, 1952.

"To the Honorable William T. Beckham, Clerk of the United States District Court for the Western District of Kentucky:

"The defendants, S. G. Olberding and Charles Darnell, and each of them now serve with their 'Designation of Contents of Record on Appeal' herein, the following concise statement of the points on which they and each of them intend to rely for a reversal thereof;

"1. The court erred in overruling the Motion of the defendants, S. G. Olberding and Charles Darnell, to quash the process and dismiss the action with supporting affidavit.

"2. The court erred in sustaining plaintiff's Motion to Dismiss the Action as to defendant Brandeis Machinery & Supply Co.

"3. The court erred in sustaining plaintiff's Motion to Strike Paragraphs 2 to 11 from defendants' First Defense of the Answer herein.

"4. The court erred in overruling defendant Charles Darnell's Motion to Dismiss the Action for Nonjoinder of Indispensable Party and for want of jurisdiction of the particular action herein.

"5. The venue of the action was wrongfully laid as to the defendants, S. G. Olberding and Charles Darnell, because each is and was at the time of the filing of the action herein a citizen and resident of Indiana.

"6. There is want of jurisdiction in the United States District Court for the Western District of Kentucky because the action is solely for personal judgment and neither plaintiff nor defendant nor any of them are citizens of Kentucky or reside in the Western District of Kentucky.

W. L. MITCHELL,
W. C. WELBORN,
MILFORD M. MILLER,
JOSEPH S. FREELAND."

SPECIFICATION OF ERRORS.

1. The court erred in giving to the process statute, Non-Resident Motorist Act, Kentucky Revised Statutes, Chapter 188, Section .020-.030 the effect of a forced waiver of the defendants' venue rights.

2. The court erred in holding the defendants waived their respective rights under the Judicial Code of the United States, Title 28 Sections 1391 (a), 1392 (a) and 1393 (a) to be sued only in the district of their physical habitation, by operating a motor vehicle in the State of Kentucky.

3. The court erred in holding that constructive service of process issuing out of the United States District Court for the Western District of Kentucky conferred jurisdiction of the persons of the defendants and of the particular action when personal service of process issued by the same court upon defendants would be unavailing, over defendants' objections, to implement the jurisdiction of the court.

4. The court erred in holding valid process issued out of the United States District Court for the Western District of Kentucky to the United States Marshal of the Eastern District of Kentucky to be served upon the Secretary of State of the Eastern District of Kentucky when neither plaintiff nor either defendant was a citizen of Kentucky nor a resident of the Western District of Kentucky.

SUMMARY OF ARGUMENT.

1. Only one court of the state has jurisdiction of an action under the Non-resident Motorist Act,—the court of the county in which the injury is done.

Sec. 74, Civil Code of Practice of Kentucky.

2. Where the process is issued by any other court it will be quashed on motion of defendant.

Kennedy v. Lee (1938), 272 Ky. 237, 113 S. W. (2d) 1125 (1126).

3. Under the construction of the Non-resident Motorist Act by the courts of the state of its adoption, the non-resident defendant can only be held to answer by process issued to the Secretary of State by the one forum, the court of the county where the injury is done.

4. There is no United States statute authorizing an action for damages to person or property to be brought in the district where the injury is done.

5. It is statutory that such actions may be brought "only" in the district where all the plaintiffs or all the defendants reside.

6. The non-resident defendant waives only the right to object to constructive service of process issued by the court of proper venue.

7. A process statute of the state which does not affect the venue rights of a defendant in the courts of the state cannot affect the venue rights of the defendant in the United States District Court.

ARGUMENT.

The question in the case arises under the Kentucky Revised Statutes, Chapter 188, Section .020 providing that the non-resident operator or owner of any motor vehicle makes the Secretary of State his agent for the service of process in any civil action instituted in the courts of the state against the operator or owner arising out of any accident or collision or damage occurring within the state in which the motor vehicle is involved. The Court of Appeals of Kentucky in the case of *Kennedy v. Lee* (1938), 272 Ky. 237, 113 S. W. (2d) 1125 (1126), holds that this non-resident motorist statute is only a process statute and that a summons issued to the Sheriff of Franklin County to be executed by delivering a copy to the Secretary of State at Frankfort is without effect when issued by a court other than that of the county where the injury was done. The court holds that the venue statute is controlling and fixes the venue in an action for injury to person or property in the county in which, in the case of a non-resident, the injury was done.

Section 74, Civil Code of Practice of Kentucky.

The injury sued on in the instant case occurred in the County of McCracken in the State of Kentucky and under

the venue act of Kentucky, the McCracken Circuit Court both before and after the enactment of the Non-Resident Motorist Act was the state court of proper jurisdiction and at all times had the jurisdiction to issue process for personal service against the defendant found within the state. The sole effect of the Non-resident Motorist Act was to make substituted service equally effective to implement the jurisdiction of the McCracken Circuit Court. The court which had the right to subject the defendant to its jurisdiction by personal service now has the right to bring the defendant into the court and proceed with or without his consent on constructive service of process.

The sole effect of the adoption of the Non-resident Motorist Act was to render valid a personal judgment for property damage upon constructive service of process issued by the court of proper venue.

There are two United States District Courts in the State of Kentucky, the Eastern and Western Judicial Districts. Neither had jurisdiction of an action for personal judgment for damage to property where neither the plaintiff nor defendant was a citizen or resident of the State of Kentucky. A summons issued out of the United States District Court of either district in an action brought by a non-resident plaintiff against a non-resident defendant if personally served on the non-resident defendant, was subject to be set aside and the service quashed on the motion of the defendant. Prior to the adoption of the Kentucky Non-resident Motorist Act if the residence requirement existed, personal judgment could be rendered only upon personal service of process.

After the adoption of the Kentucky Non-resident Motorist Act where either all the plaintiffs or all the defendants were residents of either Kentucky District, jurisdiction of the person of the defendant and of the partic-

ular action could be obtained by service of process issued out of the court of such residence to the United States Marshal of the Eastern District of Kentucky and served upon the Secretary of State at Frankfort. The sole effect upon the rights of the defendant is the same in either state or federal court. The defendant by operating his motor vehicle in the State of Kentucky gave to substituted service the same effect in obtaining jurisdiction of the person and of the action against him for damage for injury done to property as if summons were personally served upon the defendant. Only the court which had jurisdiction to issue the process for personal service prior to the adoption of the action had jurisdiction to issue effective substituted service after the passage of the act. This matter is not left to guess or hazard. The courts of the state adopting the process act had effectually defined its intent, purpose and effect upon the venue rights of the defendant under the act. The venue remains in identically the same court where it was placed by statute prior to the process act. Since the sole effect of the act is to render constructive service of process effective when issued by the court of proper venue, neither the United States District Court for the Eastern District of Kentucky nor the United States District Court for the Western District of Kentucky could obtain jurisdiction of the Non-resident motorist, or the owner of the motor vehicle, by substituted service upon the suit of a non-resident plaintiff against non-resident defendants.

There is impressed upon the Kentucky Non-resident Motorist Act as a part of the text thereof, its construction by the court of last resort of Kentucky. This rule of decision binding upon the Federal courts is supported by an unbroken line of the decisions of this Court from the earliest holdings on the subject to the latest. One of the

early statements of the rule is that of the Supreme Court in the case of *Leffingwell vs. Warren* (1862), S. C. 2 Black 599, 17 L. Ed. 261 (262):

> "The construction given to a statute of a state by the highest tribunal of such state is regarded as a part of the statute and is as binding upon the courts of the United States as the text."

This is embodied in the Rule of Decisions Act, 28 U. S. C. A. 1652. The Court of Appeals of Kentucky by its decision of the venue question under the Non-resident Motorist Act (*Kennedy vs. Lee* (1938), 272 Ky. 237, 113 S. W. (2d) 1125 (1126)) effectually closed the door to the contention that operating a motor vehicle by a non-resident motorist is, in the event of damage from the operation, a consent to be sued in any court. "This Non-resident Act" the court says, "is only a process statute." And the court holds process issued by any state court other than the court where Section 74 of the Civil Code of Practice fixes the venue, is invalid. It follows with certainty that by operating a motor vehicle in the State of Kentucky the non-resident motorist, in the event of damage from the operation waives no venue privilege granted him under the Federal venue acts.

The plaintiff invoking the Non-resident Motorist Act in any court can gain no greater rights under the Act than the state itself intended to and did grant. The defendant required to defend in any court is subjected to the loss of no other right or privilege than as defined in the plain meaning and scope of the Act.

The plaintiff gains the right to require the non-resident motorist defendant to answer upon constructive service of process issued out of the forum where the law fixes the venue. The defendant waives the right to demand personal service of process where the substituted process

is issued by the court in which the venue statutes require the action to be brought.

Prior to the decision in this case, one other and opposite decision involving a non-resident motorist act was rendered in the United States Court of Appeals for the First Circuit. In the case of *Martin vs. Fischbach Trucking Co.* (1950), 183 F. (2d) 53 (First Circuit), the defendant was a corporation which caused one of its motor vehicles to be operated in the State of Massachusetts and on whom service was obtained under the Non-resident Process Statute of that state. Diversity of citizenship was present but neither party, plaintiff or defendant, resided in Massachusetts. The defendant corporation was incorporated in Ohio and it was not licensed to do business in Massachusetts.

The Court held that the single act of causing one of its motor vehicles to be driven through the state by an agent would not constitute doing business within the state within the meaning of Section 1391 (c) of the Judicial Code.

The Court held that venue is a personal privilege which may be waived by the defendant and that *Neirbo Co. v. Bethlehem Corporation* (1939), 308 U. S. 165, does lay down the rule that the designation by a foreign corporation of an agent to receive service of process against it in a state amounts to a consent to be sued there, both in Federal and State Courts; but the Court continued that in the *Neirbo* case the appointment was in writing and operated to give express authority to receive service of process on behalf of the corporation, which laid the basis for the holding that the corporation must have thereby understood and intended that it might be sued in any court within such state and with respect to any type of action.

But, the Court continued, there was no express appointment of an agent, nor was such agency created by

any conscious or voluntary act of the defendant directed to that end. The result was one imposed by command of the law upon the doing of an act by the defendant, that is, the operation of a motor vehicle in the state. That the agency so imposed by the law could not realistically provide a basis for holding that the motorist has voluntarily waived the Federal venue privilege, which Section 1391 conferred upon him.

The Court continued to state that its view of the matter is supported by the *Restatement, Conflict of Laws*, 1948 Supp., Sec. 84.

The Court commented on the "fictional" consent to process and concluded as follows:

> "It follows from what has been said that while the defendant by operating its motor vehicle in Massachusetts subjected itself to the power of the state to require it to answer the plaintiff's claim in a suit in a state court, it did not thereby voluntarily consent to be sued or waive its federal venue privilege. The action of the District Court in dismissing the complaint was, therefore, right."

The decision in the case of *Martin vs. Fischbach Trucking Company* (1950), 183 Fed. (2d) 53 (C. A. 1), is followed in the case of *Kirksey vs. Beauchesne* (1951), 98 F. Supp. 148, and is also cited and followed in the case of *Waters vs. Plyborn* (1950), 93 F. Supp. 651.

The first case cited and relied on, in the opinion of the Court of Appeals in the present case (R. 61), is *Neirbo vs. Bethlehem Corporation* (1939), 308 U. S. 165, 170 (174).

It is believed to be erroneous to treat the single transaction of an individual operating a motor vehicle in a state as the equivalent of waiver of venue and consent to be sued, to the various activities of a foreign corporation

in seeking and obtaining permission to do business in a state, and complying with the state corporation acts by designating, through a filed written instrument, a process agent, and having a place of business and carrying on its corporate business in the state; which activities are now by the venue act declared to constitute the corporation, when sued, a resident of the state for venue purposes. There is sufficient warning in the *Neirbo* decision to avoid this error. In dealing with the effect of the deletion of the "in which he shall be found" clause from the 1887 amendment of the venue act the court (171, 172) says:

> "The restriction was designed to shut the door against service of process upon a natural person in any place where he might be caught. It confined suability, except with the defendant's consent, to the district of his physical habitation."

Nine years after the decision in the *Neirbo* case, the venue provisions of the Revised Judicial Code, Title 28, Sections 1391, 1392, 1393, were adopted. In diversity of citizenship cases against natural defendants, residence of the parties remains the test of venue. Sec. 1391 (c) provides that even in suits against corporations, the judicial district wherein the corporation is incorporated or licensed to do business or is doing business shall be regarded as the residence of such corporation for venue purposes.

The door remains shut against service of process from a United States District Court against a natural person "wherever he may be caught." And suability except with the defendants' consent is still even more clearly confined by the present venue act "to the place of his physical habitation." The doctrine of the *Neirbo* case is not the open door to forced or fictitious waivers of venue privileges. Such waiver must be actual and real, the natural result of the conduct of the defendant and not a forced or feigned

consent to be sued at a place that Congress has not designated and defendant has resisted.

Petitioners respectfully urge that the judgment herein should be in all things reversed, and the service of process upon the defendants below set aside and the summons quashed and the action in the United States District Court for the Western District of Kentucky dismissed.

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Attorneys for Petitioners.

WILLIAM L. MITCHELL,
Of Counsel for Petitioners.

APPENDIX.

STATUTES INVOLVED.

The pertinent statutory provisions of Title 28, United States Code, Section 1254 (1) are:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The venue rights claimed by the defendants-appellants arise under Title 28, U. S. C. A., Section 1391 (a):

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

Title 28, U. S. C. A., Section 1392 (a):

> "(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

Title 28, U. S. C. A., Section 1393 (a):

> "(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides."

Section 74 of the Civil Code of Practice of Kentucky provides:

> "An action for an injury to the person or property of plaintiff must be brought in the county in which the defendant resides or in which the injury is done."

The provisions of the Kentucky Revised Statutes, Chapter 188, Sections .020 and .030, are invoked by plaintiff-appellee and are as follows:

"Non-resident Owner or Operator of Motor Vehicle Makes Secretary of State Process Agent.—Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to nonresidents to operate motor vehicles or have them operated within this state shall, by such acceptance and by the operation of such motor vehicle within this state, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this state against the operator or owner arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved.

Service of Summons and Petition in Action Against Nonresident Motorist.—The clerk of the court in which the action is brought shall issue it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering a true copy to the Secretary of State at least twenty days before the return day of the summons, and shall also deliver with the summons an attested copy of plaintiff's petition. The Secretary of State shall then write a letter to the defendant, at the address given in the petition, notifying him of the nature and pendency of the action, and enclosing in the letter the summons and the copy of the petition. The letter shall be posted by prepaid registered mail and shall bear the return address of the Secretary. The Secretary shall file a report of his action, which shall include a copy of the letter, any answer thereto, and the return registry receipt, with the clerk who issued the summons."

Title 28, U. S. C. A., Section 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

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In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. 27.

S. G. OLBERDING,
doing business as
VESS TRANSFER COMPANY and
CHARLES DARNELL,
Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

W. C. WELDORN,
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-0847

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PETITIONERS' REPLY BRIEF.

I.

Questions 4 and 5 of Petition for Writ of Certiorari (R. 13, 14) present the question of the want of due process in this cause as follows:

Question 4: May a defendant in this action for personal judgment be brought into court by constructive service of process, when personal service, though had, would be unavailing? And,

Question 5: Does the United States District Court obtain jurisdiction over the persons of the defendants by service of process upon the Secretary of State when per-

sonal service upon the defendants in or out of the District would be ineffective over defendants' objection?

The answers to these questions is obvious. Process may not issue in an action for damages to property to be served without the state.

Rule 4(f) 28 U. S. C., Federal Rules of Civil Procedure.

And service of process issued by the United States District Court where neither plaintiff nor defendants are citizens of the State or resident therein is unavailing to obtain jurisdiction of the defendants or the particular action over the objection of defendants.

The issuing of this process to be sent by mail to defendants in another state cannot be of greater force or effect than actual service on the parties in the United States District Court. The fallacy of this procedure is pointed out by Circuit Judge Maris in the recent case cited in Respondent's Brief, p. 14. *McCoy v. Siler* (1953) C. A. 3, 205 F. (2d) 498 at p. 501.

There is want of due process in this procedure. The judgment herein is without due process because defendants over their repeated and seasonable objections were brought into court, subjected to trial and judgment, upon substituted process when personal service would have been unavailing. This question was presented on motion of defendant to quash the process and dismiss the action. (R. pp. 3, 4, 5, 6, Points 3 and 4 and R. p. 18 (a) (d).)

II.

There is a denial of equal rights to the defendants in this action because:

First, the right to personal judgment is based directly upon personal service of process.

The United States District Court required defendants to go to trial and judgment upon substituted service of process and rendered personal judgment against these defendants upon substituted service and over their continued objection when personal service could not have been had to be served without the state and if had and served within the state would have been invalid.

The judgment is a denial of equal rights to the defendant because without due process and made upon substituted service when the law governing the right to personal judgment requires personal service of process.

Second. The right of defendants to be sued only in the District of their physical habitation is denied them by an arbitrary application of the doctrine of waiver of venue.

The application of Sec. 188.020 of the Kentucky Revised Statutes is not confined to the use of the highways of the state by non-residents but is extended by its express terms to the operation of motor vehicles by a non-resident anywhere "within this state."

Since prior to the passage of this Non-Resident Motorist Act the operation of a motor vehicle within the State of Kentucky was not a waiver of venue in any action against the operator in any court and the Non-Resident Motorist Act itself has no relation to the venue of actions, the holding that such operation of a motor vehicle anywhere within the state is and constitutes a consent to be sued and a waiver of the venue privileges of the defendant in a United States District Court is a denial of the defendant's venue privileges under the Federal Venue Act and is discriminatory against a non-resident defendant. The holding is also discriminatory against non-resident defendants because to obtain a personal judgment against resident defendants substituted or constructive service of

process is unavailing, while the decision herein upholds a personal judgment against these non-resident petitioners obtained over their objections upon substituted or constructive service of process.

Petitioners respectfully urge that the judgment herein should be in all things reversed.

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Of Counsel for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1952, 1953

No. 928- 27

S. G. OLBERDING, Doing Business as Vess Transfer Company, and CHARLES DARNELL, ... Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, INC., ... Respondent.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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WESTERFIELD-SONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Sureme Court of the United States

October Term, 1952.

No. 683.

S. G. OLBERDING, DOING BUSINESS AS VESS TRANSFER COMPANY, AND CHARLES DARNELL, - - - - - *Petitioners,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, INC., - - - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

The respondent, Illinois Central Railroad Company, an Illinois corporation, recovered judgment against the petitioners in the District Court of the United States for the Western District of Kentucky, for $37,500.00. This judgment was obtained in an action to recover damages from appellants, residents of Indiana, for negligently operating a motor vehicle on the highways of McCracken County, Kentucky, such

negligence resulting in a heavy tractor loaded on the vehicle striking a bridge of the railroad company, and knocking the bridge and tracks located thereon out of line, thus causing the derailment of one of the railroad company's trains shortly thereafter. Summons was issued by the Clerk of the District Court, in which the action was filed. It was served on the Secretary of State at Frankfort, Kentucky, in accordance with the provisions of Kentucky Revised Statutes 188.020 and 188.030, providing for service on non-resident motorists. The statutes provide, in substance, that a non-resident motorist, who accepts the privilege of using the highways of the State, makes the Secretary of State his agent for service of process, in a civil action for negligence resulting in an accident or collision in this State. The opinion of the United States Court of Appeals, affirming the District Court, was handed down February 12, 1953. It appears on page 60 of the record, and is reported in 201 F. 2d 582.

It appears to us that the sole question presented by petitioners is this:

Did the petitioners, residents of Indiana, by operating a motor vehicle on the highways of the State of Kentucky, waive the venue provisions of Title 28, Sec. 1391 (a), U. S. C. A., and consent to be sued in the District Court by plaintiff, a resident of Illinois, to recover damages growing out of such negligent operation?

ARGUMENT.

I.

A State May Require a Non-resident Motorist to Appoint the Secretary of State Process Agent.

Numerous State statutes provide in substance that the operation by a non-resident of a motor vehicle on the highways of a State is the equivalent of the appointment of a designated State Officer as agent of the non-resident upon whom process may be served. It has been uniformly held that a State may enact such legislation in the exercise of its police power. *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632; *Kane* v. *New Jersey*, 242 U. S. 160, 37 S. Ct. 30. If the non-resident plaintiff in this case had sued the non-resident defendants in a State Court, the defendants could have removed the case to the United States District Court. *Lee* v. *C. & O. Railway Company*, 260 U. S. 653. There seems to be no reason why the plaintiffs should be permitted to sue in a State Court and not in a Federal Court, when the defendants could have removed the case from the State Court to the Federal Court.

II.

There Should Be No Legal Distinction Between the Express Consent of a Non-resident by Appointing the Process Agent and Implied Consent by Using the Highways of the State.

The appointment of a process agent by a non-resident corporation, doing business in the State and the designation of the Secretary of State as the agent of a motorist for service of process are both required by law. The requirements are valid and reasonable, and such appointments are waivers of the venue provisions of 28 *U. S. C. A.* 1391 (a). That section provides as follows:

> "A civil action, wherein jurisdiction is founded only on diversity of citizenship, may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

In the case of *Knott Corporation* v. *Furman*, Fourth Circuit, 163 F. 2d 199, referred to in the opinion of the Court of Appeals, a citizen of Massachusetts sued a Delaware corporation in the District Court for the Eastern District of Virginia, to recover damages for injuries sustained in a fire in a Virginia Hotel operated by the Delaware corporation. The defendant raised the question of venue, which is relied on by the petitioners. We quote from the opinion:

> "There is a distinction between express and implied consent, but this distinction has relation to the origin of the cause of action, not to the effect

on venue. It is reasonable to imply consent to suit and service of process from the doing of business within the state as to causes of action arising out of such business but not as to other causes of action. There is no reason for any distinction between express and implied consent, however, when it comes to the waiver of venue. If the doing of business can be held to furnish the basis of consent with respect to suit in the courts of the state, there is no reason why it should not be equally efficacious with respect to furnishing the basis of consent to suit in the federal courts. If the view be taken that the consent is wholly fictitious, there is no reason why the fiction should not serve as well in the one case as in the other. If the court, 'for purposes of justice', to use the language of Judge Learned Hand in the Smolik case, *supra* (222 Fed. 148, 151), treats the situation as if there had been consent, there is no reason why 'purposes of justice' should not be considered under federal as well as under state statutes. Certainly no purpose of justice is served by permitting a defendant to be sued in the state but not the federal courts in a situation such as this, where the defendant himself unquestionably has the right to remove the case to the federal courts if sued in the state courts."

The question presented has been considered by many Federal Courts, and with the exception of the case relied on by petitioners (Martin v. Fischback Trucking Company, 183 F. 2d 53, First Circuit), all appellate courts have followed *Neirbo* v. *Bethlehem Shipbuilding Corporation, Ltd.*, 308 U. S. 165, 60 S. Ct. 153, and *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853. The Court said in the Neirbo case, that it did not subject Federal procedure to the requirements of New York Law, but that the consent of the parties

under State legislation authorized the courts of the United States to take cognizance of the case. In the Neirbo case, the court considered a conflict between the rulings of the Second Circuit in the Neirbo case, and the Tenth Circuit in the case of Oklahoma Packing Company v. Oklahoma Gas and Electric Company, 309 U. S. 4, 60 S. Ct. 215. There would seem to be no occasion to reconsider the question. The Kentucky cases referred to by petitioners, Henry Fisher Packing Company v. Mattox, 262 Ky. 318, 90 S. W. 2d 17, and Kennedy v. Lee, 272 Ky. 237, 13 S. W. 2d 1125, do not appear to us to strengthen petitioners' position. The language quoted from the Lee case to the effect that the non-resident motorist statute is a process statute, could not have the effect contended for, namely, that it does not affect venue. The statute expressly appoints the Secretary of State as agent of the non-resident operator of a motor vehicle to receive the service of summons. The question of venue is a matter of Federal procedure. The venue of actions in the Federal Courts is governed by Federal statutes, and rulings of Kentucky Courts on questions of venue, even if applicable, would not be controlling. *Dan Cohen Realty Company* v. *National Savings & Trust Company*, Eastern District of Kentucky, 36 F. Supp. 536.

No good reason has been given for a distinction between a non-resident's waiver of venue by the appointment of a resident agent, and a non-resident's implied waiver, by doing business in the State, or by operating a motor vehicle upon the highways of the

State. Other rulings of Federal Courts, sustaining the decision of the lower court, are:

Mississippi Publishing Company v. Murphee, 326 U. S. 438, 60 S. Ct. 153;
Jacobson v. Schuman, 105 F. Supp. 483;
Burnett v. Swenson, 95 F. Supp. 524;
Urso v. Scales, 90 F. Supp. 653;
Krueger v. Hider, 48 F. Supp. 708;
Steele v. Dennis, *et al.*, 62 F. Supp. 73;
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Archambeau v. Emerson, *et al.*, 108 F. Supp. 28,

It appears to us that the question has been clearly settled by the decision of this Court.

Respectfully submitted,

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October Term, 1953.

No. 27.

S. G. OLBERDING, Doing Business As VESS TRANSFER COMPANY and CHARLES DARNELL, - - - Petitioners,

versus

ILLINOIS CENTRAL RAILROAD COMPANY, - - - - - - - - Respondent,

---

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPONDENT'S BRIEF.

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Supreme Court of the United States

October Term, 1953.

No. 27.

S. G. OLBERDING, DOING BUSINESS AS VESS TRANSFER COMPANY AND CHARLES DARNELL, - - - - - - - *Petitioners,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Respondent.*

RESPONDENT'S BRIEF.

STATEMENT OF CASE.

In April, 1951, the petitioner, Darnell, as agent and employee of the petitioner, Olberding, drove a tractor and flat-bed trailer, on which was loaded a bulldozer shovel against an overhead bridge of the respondent railroad company in McCracken County, Kentucky. The force of the collision was sufficient to knock respondent's bridge and tracks out of line, thus causing the derailment of one of respondent's trains shortly thereafter. This was not a single isolated use of Kentucky Highways by the petitioners as owner and driver respectively of the truck. This was the third trip from Louisville to Paducah, hauling machinery for the same shipper (R. 28, 29). After

the accident the driver went back to Louisville to get another Caterpillar and take it to Evansville (R. 30). In an action for damages in the District Court for the Western District of Kentucky, respondent recovered verdict and judgment for $37,500.00.

Summons issued by the Clerk of the District Court for the Western District of Kentucky, was directed to the United States Marshal for the Eastern District of Kentucky, and by him served on the Secretary of State at Frankfort, Kentucky, in accordance with the provisions of *K. R. S. 188.020* and *188.030*, providing for service on non-resident motorists in actions arising out of accidents on the highways of the State. The Statutes which will be quoted are similar to those enacted in the majority of the States, providing in substance that a non-resident motorist who accepts the privilege of using the highways of the State, makes the Secretary of State his agent for service of process in a civil action for negligence resulting in an accident or collision in the State. The opinion of the court below is reported in 201 F. 2d 582. It appears to us that the principal, if not the sole, question presented by petitioners is this:

> Did the petitioners, residents of Indiana, by operating a motor vehicle on the highways of the State of Kentucky, waive the venue provisions of Title 28, Sec. 1391(a) U. S. C. A. and consent to be sued in United States District Court, in an action to recover damages resulting from negligence in such operation?

SUMMARY OF ARGUMENT.

I.

This action for damages was filed in the District Court of the Western District of Kentucky, the District in which the alleged negligent operation of the motor vehicle occurred. Process issued by the Clerk of that Court was directed to the United States Marshal for the Eastern District of Kentucky, where Frankfort, the capitol of the State, is located. There it was served by the Marshal on the Secretary of State, in accordance with the provisions of *K. R. S. 188.020* and *188.030*. Such service was sufficient to bring before the court the non-resident defendants, owner and operator respectively of the motor vehicle involved in the collision and accident.

II.

By the operation of a motor vehicle on the highways of the State of Kentucky, petitioners made the Secretary of State their agent for service of process in this action, and waived the venue provisions of *Title 28, Sec. 1391 (a) U. S. C. A.* The application of the doctrine of *Neirbo Company* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 165, 60 S. Ct. 153, to this situation is reasonable and supported by the weight of authority.

III.

The venue of actions in the Federal courts is governed by the Federal Statutes. The Kentucky cases cited by petitioners do not support their position.

ARGUMENT.

I.

In an action for damages brought against non-resident motorists in United States District Court for the Western District of Kentucky under the authority of K.R.S. 188.020 and 188.030, process directed to the United States Marshal for the Eastern District of Kentucky, and served by him on the Secretary of State would bring such non-residents before the Court.

Chapter 188 of the Kentucky Revised Statute is set out under the following caption:

"NON-RESIDENT MOTORISTS—SERVICE OF PROCESS ON". The following sections of the Chapter are relevant:

> "188.020 (12-1) NONRESIDENT OWNER OR OPERATOR OF MOTOR VEHICLE MAKES SECRETARY OF STATE PROCESS AGENT. Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this State to nonresidents to operate motor vehicles or have them operated within this State shall, by such acceptance and by the operation of such motor vehicle within this State, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this State against the operator or owner arising out of or

by reason of any accident or collision or damage occurring within this State in which the motor vehicle is involved."

"188.030 (12-2) SERVICE OF SUMMONS AND PETITION IN ACTION AGAINST NONRESIDENT MOTORIST. The Clerk of the Court in which the action is brought shall issue a summons against the defendant named in the petition and direct it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering a true copy to the Secretary of State and shall also deliver with the summons an attested copy of plaintiff's petition. The Secretary of State shall immediately mail the copy of the summons and petition to the defendant at the address given in the petition. The letter shall be posted by prepaid registered mail and shall bear the return address of the Secretary of State. The sheriff shall make the usual return to the court, and in addition the Secretary of State shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the Secretary of State and the action shall proceed as provided in the Rules of Civil Procedure. (1952, c. 84, Sec. 64; effective July 1, 1953)."

"188.060 (12-5) OTHER METHODS OF SERVING PROCESS NOT AFFECTED. This chapter extends the right of service of process upon nonresidents, and does not limit any other provisions for the service of process."

The question involves the consideration of the following Rules of Civil Procedure:

RULE 4. PROCESS.

"(c) BY WHOM SERVED. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result."

"(d)(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

"(d) (7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summonsor or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

"4. (f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides,

beyond the territorial limits of that state. A Subpoena may be served within the territorial limits provided in Rule 45."

In the case of *Mississippi Publishing Company* v. *Murphree*, 326 U. S. 438, 66 S. Ct. 242, a resident of the Northern District of Mississippi filed action in that District to recover damages for libel against a Delaware corporation, having an office and place of business in the Southern District of Mississippi. The action was begun by service of summons in the Southern District by the United States Marshal upon the agent designated by the corporation to receive service of process within the State. The court considered the question of venue and the sufficiency of the service. On the question of venue, the court referred to and followed the doctrine of *Ex Parte Schollenberger*, 96 U. S. 369, and *Neirbo* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 165. The court stated that the consent to suits in the Federal courts was a consent to suits brought in conformity to Federal regulations governing jurisdiction, venue and procedure of those courts. We quote from the opinion:

"The question remains whether Rule 4(f) is an effective means of bringing the petitioner before the district court in the northern district where the suit was properly brought in conformity to Section 51 of the Judicial Code. The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. But in ascertaining their

meaning the construction given to them by the Committee is of weight. Rule 4(f), as explained by the authorized spokesmen for the Advisory Committee, see Proceedings of Washington and New York Institute on Federal Rules, 291, 292; Proceedings of The Cleveland Institute on the Federal Rules, 205, 206, was devised so as to permit service of process anywhere within a state in which the district court issuing the process is held and where the state embraces two or more districts. It was adopted with particular reference to suits against a foreign corporation having an agent to receive service of process resident in a district within the state other than that in which the suit is brought. It was pointed out that the rule did not affect the jurisdiction or venue of the district court as fixed by the statute, but was intended among other things to provide a procedural means of bringing the corporation defendant before the court in conformity to its consent, by serving the agent wherever he might be found within the state. See also Hughes, Federal Practice, Vol. 17, Sec. 18093; Moore, Federal Practice, Vol. 1, p. 360-361."

The court held that the service was sufficient. The application of Rule 4 to such service is consistent with the purpose of permitting freedom and flexibility of procedure in giving defendants notice of the filing of the action. The procedure outlined in the statute is available in the Federal courts. The rule has been followed by lower courts in well considered cases.

"In action for injuries sustained in collision within Western District of Louisiana with auto-

mobile owned by nonresident, service of process upon automobile owner's nonresident liability insurer through its statutory agent for service of process, the Secretary of State, was valid though Secretary of State was domiciled in the Eastern District, where he was served by marshal of that district. Federal Rules of Civil Procedure, rule 4(f), 28 U. S. C. A. following section 723c."

Cheshire et ux. v. Car & General Insurance Corp., et al., 4 F. R. D. 353.

In the case of *Townsend* v. *Fletcher, et al.*, Northern District of Ohio, 9 F. R. D. 711, a summons was apparently served, as in this action, under the authority of a similar State statute. The service was upheld. See also *Morris* v. *Sun Oil Company, et al.*, D. C. Maryland, 88 F. Supp. 529.

II.

By the operation of a motor vehicle within the State of Kentucky, the non-resident petitioners waived the venue provisions of *Title 28, Section 1391(a), U. S. C. A.*

Section 1391(a), Title 28, U. S. C. A., is as follows:

"(a) A civil action wherein jurisdiction is founded only on a diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

Respondent contends that this question is controlled by the doctrine of *Neirbo* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 165, and the numerous well considered cases in which that doctrine has been applied in actions similar to this. In the Neirbo case,

the court held that a foreign corporation's designation of an agent for the service of process, as required by the law of a State constituted consent to be sued in a Federal court for that State in effect waiving the provisions of the above quoted statute as to venue. We quote from the opinion:

> "The classic doctrine was that a corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty.' Bank of Augusta v. Earle, 13 Pet. 519, 588, 10 L. Ed. 274. Logically applied, this theory of non-migration prevented suit in a non-chartering state, for the corporation could not be there. And such was the practice of the circuit courts until the opinion of Chief Justice Waite in Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853, displaced metaphor with common sense. The essential difference between the practice which Mr. Justice Nelson initiated at circuit and the decision in Schollenberger's case was not a matter of technical legal construction, but a way of looking at corporations. Men's minds had become habituated to corporate activities which crossed state lines. The fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities. And so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business. That service upon such an agent, in conformity with a valid state statute, constituted consent to be sued in the federal court and thereby supplanted the immunity as to venue, was the rationale of Schollenberger's case."

The court considered fully the elimination in the Act of 1937 of the words "in which he shall be found" from the Act of 1875. In spite of this change, the Federal courts continue to apply the doctrine of *Ex Parte Schollenberger*, 96 U. S. 369, until *Southern Pacific* v. *Denton*, 146 U. S. 302. The Denton case is distinguished because the Texas statute involved, required the corporation as a condition precedent to obtain a permit to do business within the State to surrender the right of removal to the Federal courts. This action was unconstitutional and void, and it could give no validity to any action of the corporation in obedience to its provisions. It is also pointed out in the Neirbo opinion that by finding an actual consent to be sued, the court was not subjecting Federal procedure to the requirements of New York law, but finding, in substance, that the consent of a party, in accordance with State statutes, could result in a situation authorizing the Federal courts to take cognizance of a case. The doctrine is entirely consistent with the Schollenberger case, and the holdings of *Kane* v. *New Jersey*, 242 U. S. 160, 37 S. Ct. 30, and *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632. These earlier cases not only establish the constitutionality of such State statutes as within the power of the State to regulate the use of highways, but they also apply the doctrine of implied consent in proceedings growing out of accidents on the highways. It is expressly stated in Hess v. Pawloski that the difference between formal and implied consent is not substantial so far as con-

cerns the application of the due process clause. The doctrine of implied consent was recognized by the Fourth Circuit in *Knott Corporation* v. *Furman*, 163 F. 2d 199. That was an action by Mary Hale Furman, a citizen of Massachusetts against The Knott Corporation, a Delaware corporation, for injuries sustained in the course of a fire which damaged a hotel in Virginia, in which plaintiff was a guest. The question of venue was fully considered under a State statute, which not only required a foreign corporation to designate a process agent, but expressly provided that if such company should do business in Virginia without having expressly appointed the Secretary of the Commonwealth as its agent, it would be deemed to have made such appointment by doing business in the State. The court upheld this provision, stating that the statute was of a highly remedial nature and should be liberally construed. Following and quoting from the Neirbo case, the court held that such appointment of an agent waived the provisions of the federal venue statute. The court also followed the reasoning of the Neirbo case in this language:

> "To hold that it should be given effect for one purpose but not for the other would not only be illogical but would result in the anomaly of permitting the defendant to be sued in the state but not in the federal courts, although all the elements of federal jurisdiction are present and although defendant would itself have the right to remove the case into the federal court if sued in the courts of the state."

The authority and soundness of the reasons for the Neirbo decision seem to make it applicable to actions arising under nonresident motorist statutes. The following is quoted from the opinion of the District Court of the Western District of Michigan, from *Archambeau v. Emerson*, 108 F. Supp. 28:

> "Venue is a personal privilege which may be either expressly or impliedly waived by a defendant. Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167; Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U. S. 177, 49 S. Ct. 98, 73 L. Ed. 252; Knott Corporation v. Furman, 4 Cir., 163 F. 2d 199; Morris v. Sun Oil Co., D. C., 88 F. Supp. 529; Steele v. Dennis, D. C., 62 F. Supp. 73. In Lee v. Chesapeake & Ohio Railway Co., 260 U. S. 653, 43 S. Ct. 230, 231, 67 L. Ed. 443, the court said in referring to the provisions of the old Judicial Code, Judicial Code, Sec. 51, 28 U. S. C. A., Sec. 112, defining general jurisdiction of the district courts and the provisions relating to venue of suits:
>
> > 'It is a necessary conclusion from repeated decisions, going back to the original Judiciary Act of 1789 that this provision does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election.'"

The Michigan statute is similar to the Kentucky statute. The above is only one of the many cases growing out of automobile accidents based on the hold-

ing in the Neirbo case. See *Urso* v. *Scales, et al.*, E. D. Pa., 90 F. Supp. 653; *Steele* v. *Dennis*, Md., 62 F. Supp. 73; *Krueger* v. *Hider*, E. D. South Carolina, 48 F. Supp. 708; *Burnett* v. *Swenson*, W. D. Okla., 95 F. Supp. 524; *Andrews* v. *Joseph Cohen & Sons*, S. D. Texas, 45 F. Supp. 732. It has been argued that the Neirbo case applies only to corporations. Such arguments have been disallowed. Krueger v. Hider *supra*.

The petitioners reply, of course, on Martin v. Fischbach Trucking Company, CA 1, 183 F. 2d 53, and one District Court case following it. We refer to Waters v. Plyborne, 93 F. Supp. 651. The later case of *McCoy* v. *Siler*, CA 3, 205 F. 2d 498, appears to have been decided by the same judge who decided the Fischbach case, Judge Maris. Circuit Judge Goodrich follows the Fischbach doctrine. Judge Biggs, Chief Judge of that court, dissents, following the Neirbo and Schollenberger cases. He concludes his opinion as follows:

> "I do not agree with the reasoning or the conclusion in Martin v. Fischbach Trucking Company, First Circuit, 1950, 183 F. 2d 53. I agree with the conclusion reached in Olberding v. I. C. Railroad, 6th Circuit, 1953, 201 F. 2d 582."

The practical usefulness and necessity of the Neirbo doctrine is obvious. In considering the conflict presented on this appeal, we find no good reason why the same rule should not be applied to cases based on the nonresident motorist statutes. It would seem that every practical sound reason suggests the holding that

such motorists have consented to be sued under circumstances similar to those existing in this case.

III.

Venue of actions in Federal Courts is governed by Federal statutes.

In the action of *Dan Cohen Realty Company* v. *National Savings and Trust Company*, 36 F. Supp. 536, affirmed 125 F. 2d 288, on the authority of *Chase* v. *Wetzlar*, 225 U. S. 79, which he cited, District Judge Ford wrote as follows:

> "Assuming the analogy between the two types of cases to be complete, it does not follow that the procedural rules of the State governing the venue of State Courts in respect to such actions are controlling upon the question under consideration. Venue of actions in the Federal courts is governed by the Federal Statutes, and 'the power which a state court may exert in a particular contingency affords no basis for the assumption that the act of Congress extends to a subject which the language of the act does not embrace.' Chase v. Wetzlar, 225 U. S. 79, 89, 32 S. Ct. 659, 663, 56 L. Ed. 990."

To the same effect see *Woodard* v. *Mutual Life Insurance Company of New York*, W. D. La., 59 F. Supp. 452, from which we quote the following:

> "Taking up now the cases cited by defendant's counsel, first in connection with the contention that decisions of the state court are binding upon us

> under Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, it must be remembered that the matters of jurisdiction and venue of the Federal Courts are controlled by national statutes and decisions and can not be affected by those of the state. Cyc. Fed. Proc. 2d p. 174; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 S. Ct. 125, 54 L. Ed. 272; Carby v. Greco, D. C., 31 F. Supp. 251, and authorities cited."

It seems to us that the Kentucky cases cited by petitioners have no application. As indicated in the Neirbo case, State legislation may bring about a situation which enables the Federal courts to take cognizance of a case. Nevertheless, the effect on venue is a matter of Federal, not State, law. Petitioners misconstrue the doctrine of the Kentucky cases of Henry Fisher Packing Company v. Mattox, *et al.*, 262 Ky. 318, 90 S. W. 2d 70, and Kennedy v. Lee, 272 Ky. 237, 113 S. W. 2d 1125. Prior to 1942 the Kentucky nonresident motorist statute attempted to fix the venue of an action filed thereunder either in the County where the loss or accident occurred, or in the County where the plaintiffs, or one of the plaintiffs resided. Section 74 of the Kentucky Civil Code, now K. R. S. 452.460, provided that actions for injury to the person or property of the plaintiff should be brought in the County in which the defendant resided, or in which the injury was done. In the Mattox case, our Court of Appeals held that so much of the statute as permitted the action against a nonresident motorist to be brought in

the County in which the *plaintiff* resided was unconstitutional, because it discriminated against the nonresident motorist. In a revision of the Kentucky Statutes in 1942, the unconstitutional provision was eliminated.

The isolated statement in the case of *Kennedy* v. *Lee*, 272 Ky. 237, 113 S. W. 2d 1125, that the nonresident motorist act was purely a process statute does not seem to aid petitioners in their contention. The Court of Appeals decided that an action by a resident of Kentucky against a nonresident arising out of the operation of an automobile on the highways of the State could only be instituted in the County where the accident occurred, and that process issued in a County other than that in which the accident occurred would not bring the defendant before the court. As indicated above we think these Kentucky cases do not affect a question of venue under Federal law. We have referred to them briefly, however, to show that they do not strengthen the position of petitioners.

CONCLUSION.

It has been held that no legal distinction should be drawn between a nonresident's express consent to suit and waiver of venue by the designation of a process agent, and such nonresident's implied consent and waiver by doing business in the State. On the sound authority of the Neirbo case, many courts have applied this rule, holding that a nonresident gave consent to be

sued and waived venue under State statutes regulating nonresidents' use of State highways. A contrary conclusion would not only limit the effectiveness and thwart the policy of such statutes, but would discriminate in favor of nonresidents, permitting them to remove cases to the Federal court, though they could not be sued there. The better reasoning supports the application of the Neirbo doctrine to cases arising under the nonresident motorist statutes.

Respectfully submitted,

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